

CANADA / JUDGMENT

R. v. Sewell

2025 BCCA 348

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 348 R. v. Sewell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sewell,

2025 BCCA 348

Date: 20251014

Docket: CA50632

Between:

Rex

Appellant

And

Justin Donald Sewell

Respondent

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 Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

The Honourable Justice Warren

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).

Counsel for the Appellant:

M. Shah

Counsel for the Respondent:

R.C. Gibbs, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

July 14, 2025

Place and Date of Judgment:

Vancouver, British Columbia

October 14, 2025

Written Reasons by:

The Honourable Justice Warren

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

Summary:

The Crown appeals the sentence imposed on one count of sexual assault and two counts of voyeurism. The respondent received a cumulative sentence of two years less a day to be served pursuant to a conditional sentence order, which was effected by the imposition of concurrent sentences of two years less a day imprisonment on the sexual assault count, six months' imprisonment on one of the voyeurism counts, and three months' imprisonment on the other. The Crown says the sentencing judge erred in principle by overstating the mitigating effect of the respondent's confession and allowing it to overwhelm the analysis, imposing concurrent sentences that fail to account for the distinct harm caused by the voyeurism offences, and making the sentences concurrent for the purpose of preserving the availability of a conditional sentence order.

Held: Leave to appeal is granted, the appeal is allowed, and the sentence imposed in the Provincial Court is set aside. This Court imposes 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. Neither the sentencing judge's conclusion concerning the mitigating effect of the confession nor his weighing of that factor was tainted by error. However, in imposing concurrent sentences, the judge erred in failing to consider the distinct legal interests violated by the voyeurism offences and the fact that one of the voyeurism offences arose from a different incident from that underlying the sexual assault and the other voyeurism offence. He also erred in failing to consider whether, in light of those factors, a penitentiary term was excluded as a cumulative sentence before determining the appropriateness of a conditional sentence order.

Reasons for Judgment of the Honourable Justice Warren:

Introduction

- [1] This is a Crown appeal from sentence. The respondent, Justin Donald 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") under s. 742.1 of the Criminal Code, R.S.C. 1985, c. C-46: *R. v. Sewell* (4 April 2025), Fort St. John 37506-1/37506-3/37506-4 (B.C.P.C.) ("RFS"). The sentencing judge also made certain ancillary orders but declined to order the respondent to comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA].
- [2] The offences occurred in or around 2007, when Ms. Luke was 20 years old. At that time, Ms. Luke was living with the respondent and his wife, M., who is one of Ms. Luke's two sisters. While his wife and children were away, the respondent surreptitiously added ketamine or Valium to Ms. Luke's drink, rendering her incapacitated. The respondent then sexually assaulted Ms. Luke and took photographs of her naked body. Ms. Luke did not have a clear memory of the sexual assault, but she did remember waking up to the respondent removing her shorts and underwear. On other occasions, the respondent took photographs of Ms. Luke through her bedroom window.
- [3] The respondent's conduct ultimately led to a rift in the family and eventually Ms. Luke cut off all contact with him.
- [4] 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 the respondent at the Globe Restaurant at the Vancouver International Airport. During that meeting, the respondent confessed what he had done. He disclosed the details of the sexual assault and that he had given Ms. Luke either ketamine or Valium. He told Ms. Luke about the photographs he had taken during the sexual assault and through her bedroom window.

- [5] In his reasons, the sentencing judge summarized the relevant recent jurisprudence from this Court including *R. v. Maslehati*, 2024 BCCA 207, where it was emphasized that "penalties imposed for sexual assault against adults must reflect society's contemporary understanding of the profound harmfulness and wrongfulness of sexual violence": at para. 83. Maslehati also instructed that, in the absence of diminished moral blameworthiness or compelling mitigation, a penitentiary term of imprisonment is generally required for adult sexual assault involving aggravating circumstances prosecuted by indictment, and even where imprisonment of less than two years is imposed in such a case, a conditional sentence will generally be inconsistent with the fundamental purpose and principles of sentencing: at paras. 11-13.
- [6] Despite finding several aggravating circumstances and high moral blameworthiness, the sentencing judge concluded there was compelling mitigation. In these circumstances, he found that a sentence of two years less a day imprisonment was appropriate for the sexual assault, that sentences of six months and three months were appropriate on the voyeurism counts, that the sentences on the voyeurism counts should be served concurrent to the sentence for the sexual assault, and that the cumulative sentence of two years less a day would be served pursuant to a CSO.
- [7] The Crown asserts the sentencing judge committed several errors in principle that impacted the sentence: overstating the mitigating effect of the confession, allowing that mitigating factor to overwhelm the analysis and failing to balance it against the aggravating circumstances, imposing concurrent sentences that fail to account for the distinct harm caused by the voyeurism offences, and making the sentences concurrent for the purpose of preserving the availability of a CSO. The Crown's position is that a penitentiary term of imprisonment was required.
- [8] The respondent argues the judge committed no error in principle and the decision to impose concurrent sentences is discretionary, such that the high standard of review disposes of this appeal.
- [9] In my view, the sentencing judge's consideration of the mitigating and other attenuating circumstances, and the weight given to them, do not reflect any error in principle that impacted the sentence. While a penitentiary term is generally required for adult sexual assault involving aggravating circumstances, I do not view the sentence of two years less a day imprisonment for the sexual assault to be the result of material error. However, I agree with the Crown that the imposition of concurrent sentences for the voyeurism offences reflects errors in principle.
- [10] For the reasons that follow, I would grant the Crown leave to appeal the sentence, allow the appeal, and substitute a custodial sentence of two years less a day of imprisonment on the sexual assault count (Count 1); six months' imprisonment on one of the voyeurism counts (Count 3), consecutive to the sentence on Count 1; and three months' imprisonment on the other voyeurism count (Count 4), consecutive to the sentences imposed on Counts 1 and 3.

Circumstances of the Offences and Events Leading to the Charges

- [11] As mentioned, the respondent was married to Ms. Luke's older sister, M. He first met Ms. Luke in 1997, when she was 10 or 11 years old, and he was 20 or 21 years old. Ms. Luke came to view him as an older brother.
- [12] In 2007, when Ms. Luke was 20 years old, she moved in with the respondent and M. at their family home in Charlie Lake. In June of that year, while M. was out of town, the respondent offered to provide a safe environment for Ms. Luke to get drunk for the first time.
- [13] On the evening of June 7, 2007, the respondent mixed some alcoholic drinks for Ms. Luke, and unbeknownst to her, he added ketamine or Valium to one of her drinks. Ms. Luke was rendered incapacitated. The respondent then removed her clothing, masturbated and ejaculated twice on her leg, removed his own clothes, and pressed his naked body against her. He also took approximately 30 photographs of Ms. Luke without her clothes on, including a photograph of his penis near her face.
- [14] As a result of the drugs and alcohol, Ms. Luke did not have a clear memory of what the respondent had done. However, she remembered waking up to the respondent removing her shorts and underwear and she knew "something terribly wrong had occurred": RFS at para. 25.
- [15] In September 2007, Ms. Luke moved away to attend school. The respondent kept the photographs of Ms. Luke on his computer at work and looked at them from time to time. At some point, his staff saw the photographs but assumed they were of the respondent's wife. The respondent subsequently destroyed the photographs.
- [16] The sexual assault ultimately resulted in a fracture of Ms. Luke's family. In 2014, Ms. Luke's other sister, S., learned about the photographs. Ms. Luke then cut off all contact with the respondent. Over the subsequent years, the respondent sent emails to Ms. Luke to which she did not respond. According to the sentencing judge, there are no admissions of guilt or wrongdoing in those emails but the respondent "appears to be letting Ms. Luke know that he is willing to talk with her whenever she is ready". The sentencing judge characterized these emails as "important to set the context of what occurs at the Globe Restaurant on October the 29th, 2021": RFS at para. 49.
- [17] In July 2019, the respondent sent an email to Ms. Luke in which he indicated that he would support her decision to disclose what he had done. Shortly thereafter, S. contacted Dr. B., a veterinarian who was a colleague of the respondent, and with whom the respondent had been in a sexual relationship. Dr. B. told S. that in 2014 the respondent told her he had drugged Ms. Luke with ketamine and taken photographs of Ms. Luke, which Dr. B assumed were sexual in nature.
- [18] In August 2019, after receiving the respondent's July 2019 email, and learning about Dr. B.'s disclosure to S., Ms. Luke reported the matter to the RCMP.

- [19] In 2021, with the investigation having been underway for about two years, the police proposed that Ms. Luke become a police agent to attempt to obtain a confession from the respondent. Working with an RCMP team, Ms. Luke emailed the respondent to the effect that the only way for her and the family to move on would be for her and the respondent to have a real conversation. The respondent replied to that email 44 minutes later, very clearly indicating that he welcomed a conversation, and advising Ms. Luke he would engage in any process she felt appropriate.
- [20] On October 29, 2021, at Ms. Luke's request, the respondent flew to Vancouver and met with Ms. Luke at the Globe Restaurant. Ms. Luke recorded the meeting. At the outset of the meeting the respondent asked Ms. Luke if she was recording it and she said she was not. The respondent replied: "Kay, it -- it wouldn't matter to me 'cause I feel this is your information and you do whatever you want with it.": RFS at para. 50. The respondent then confessed to Ms. Luke the details of the sexual assault and that he had taken photographs during it. The respondent also told Ms. Luke that he put Valium or ketamine in her drink and that he had taken additional photographs of her from outside her bedroom window. Much of the information the respondent provided was new to Ms. Luke, including the information about the photographs taken from outside her bedroom window.
- [21] In April 2022, the Crown charged the respondent with four counts: Count 1--sexual assault; Count 2--administering a stupefying drug to Ms. Luke with intent to enable him to commit the sexual assault; Count 3--voyeurism arising out of the photographs the respondent took during the sexual assault; Count 4--voyeurism arising out of the photographs the respondent took from outside Ms. Luke's bedroom window.
- [22] Early in the legal process, the respondent instructed his counsel that he would plead guilty to Counts 1, 3, and 4. On November 15, 2022, he did that, and the Crown stayed Count 2.

Impact on Ms. Luke

- [23] The offences had a devastating impact on Ms. Luke. She suffered years of emotional and psychological pain, debilitating anxiety, and depression. The respondent's actions created a terrible fracture within her family as Ms. Luke's parents and M. sided with the respondent, while S. supported Ms. Luke. As the sentencing judge put it, "[y]ears of all of their lives [were] lost to each other by the actions of [the respondent].": RFS at para. 25.

Circumstances of the Offender

- [24] At the time of the sentencing, the respondent was in his late 40s, with no criminal record. He and M. had four children together. He was a full-time veterinarian with a thriving clinic in Fort St. John, which employed 15 people. He was the only full-time vet at the clinic, and he told the sentencing judge that if he was unable to continue working there as a result of being incarcerated, the clinic would likely close. His patients would be left with nowhere else in town to take their animals as the only other veterinary clinic in Fort St. John was at

capacity.

- [25] The respondent was active in his church community, where he was accepted despite public knowledge of the crimes he committed. He performed volunteer work and had made substantial financial donations to charity.
- [26] The respondent claimed to have had a longstanding addiction to pornography, which he identified as the root cause of his offending and the difficulties in his relationship with M. In 2014, their relationship almost ended due to his infidelity, and the respondent identified this as a catalyst for him changing his life and seeking professional help.
- [27] The respondent had significant community support. At the sentencing hearing he submitted 88 letters of support from community members, business associates, employees, and friends attesting to his good character. Many of the letters identified him as a changed man since 2014.
- [28] A pre-sentence psychiatric report was written by a Dr. Serkia, who expressed the view that the respondent's risk to reoffend sexually is low. Dr. Serkia also identified steps the respondent had taken since 2015 to address his behavior. These included attending a seven-day clinical workshop and immersion in a course called the "Conquer Series, A Battle Plan for Sexual Purity". The focus of the Conquer Series course is to provide strategies and tools to permanently stop watching pornography. Through that course, the respondent formed a relationship with an "accountability partner" who became a trusted friend who offered the respondent consistent support. The respondent also had accountability software installed on his electronic devices, which was controlled by his wife so he could not unilaterally remove it.

Sentencing Proceedings

- [29] At the sentencing hearing, the Crown proposed a cumulative sentence of four-and-a-half years' imprisonment and sought typical ancillary orders including a firearms prohibition and a SOIRA order. Defence counsel sought a cumulative sentence of two years less a day to be served pursuant to a CSO and opposed the firearms prohibition and a SOIRA order.
- [30] As mentioned, the Crown directed a stay of proceedings on Count 2: administering a stupefying or overpowering drug with intent to enable or assist him to commit the sexual assault. Instead, the Crown chose to prove the essential elements of Count 2 as aggravating facts: specifically, that the respondent administered a stupefying substance with the intent to commit a sexual assault of Ms. Luke.
- [31] The respondent took issue with the alleged aggravating facts and a Gardiner hearing (*R. v. Gardiner*, [1982] 2 S.C.R. 368, 1982 CanLII 30) was necessary in light of the Crown's burden to prove the contested facts beyond a reasonable doubt. During the Gardiner hearing, the respondent testified that he had put Ativan in Ms. Luke's drink and admitted this was a stupefying substance: *R. v. Sewell* (17 June 2024), Fort St. John 37506-1 at para. 13 (B.C.P.C.)

[Gardiner Reasons]. However, the respondent denied doing so to enable him to commit a sexual assault. Rather, he claimed he did so "in the hopes that [Ms. Luke] would somehow become more loose or free and that he had some vain hope that [Ms. Luke] would then reveal her true feelings for him": Gardiner Reasons at para. 13. The respondent's explanation for telling Ms. Luke during the recorded meeting that he put Valium or ketamine in her drink was that those drugs were available to him through his clinic while Ativan was not, he had obtained the Ativan from his uncle, and he did not want to disclose that he possessed the Ativan without a legal reason.

[32] The sentencing judge did not believe the respondent's evidence at the Gardiner hearing and found that he gave Ms. Luke either Valium or ketamine. However, he also found that the Crown had not proven beyond a reasonable doubt that the respondent administered the drug with the intention of committing a sexual assault.

[33] The sentencing hearing proceeded some months after the Gardiner hearing. The evidence at the sentencing hearing included formal admissions, a transcript of the October 29, 2021 meeting, emails exchanged between Ms. Luke and the respondent, news articles, victim impact statements, a pre-sentence report, Dr. Serkia's psychiatric assessment, and letters of support for the respondent.

Sentencing Reasons

[34] The sentencing judge commenced his reasons by summarizing the purpose and principles of sentencing as set out in ss. 718 through 718.2 of the Criminal Code: RFS at paras. 3-4.

[35] At paras. 39-47 of the sentencing reasons, the judge addressed the aggravating factors and found:

- the respondent surreptitiously placed drugs into Ms. Luke's drink, knowing the impact of those drugs on the human body, and rendering Ms. Luke unconscious, unable to protect herself, and with virtually no memory of the assault;
- the respondent offered to provide a safe space for Ms. Luke to get drunk, thereby placing himself in a position of trust towards her, which he then abused;
- the sexual assault was prolonged;
- the sexual assault involved invasive, violative, and demeaning conduct;
- the respondent used Ms. Luke for his own sexual gratification with no apparent thought for the effect of his actions on her;
- all the crimes were committed while Ms. Luke was in her own home, a place she should have been safe;
- the offences had a devastating impact on Ms. Luke and caused her and her family foreseeable harm; and

- there was an element of planning present in that the respondent brought the drugs to the home for the purpose of putting them in Ms. Luke's drink.

[36] The judge found the following mitigating and attenuating factors:

- The respondent had no prior criminal record: RFS at para. 48.
- In the years after 2014, the respondent let Ms. Luke know he was willing to talk to her, and when the opportunity arose in October 2021, he confessed to his crimes, knowing that the statements he made could be used against him, and this "led to this prosecution and formed the basis of the admissions of fact underpinning the guilty pleas": RFS at paras. 49-51.
- The respondent instructed his counsel early in the process of his intention to plead guilty, which saved a trial and all the expense and time associated with a trial, and he did not challenge the admissibility of the recording of the October 29, 2021 meeting. The sentencing judge found the guilty pleas were a true reflection of the respondent's intentions and not a reaction to being caught: RFS at para. 52.
- The respondent was truly remorseful as evidenced by his cooperation with Ms. Luke at the Globe Restaurant meeting, his guilty pleas, and his statements in Court, which the judge found to be genuine and heartfelt: RFS at para. 56.
- The respondent's risk of reoffending was likely low, based on Dr. Serkia's conclusions combined with the steps taken by the respondent to address his behavior, and the fact there was no suggestion of reoffending in the 18 years since 2007: RFS at paras. 57-65.

[37] The sentencing judge recognized that deterrence and denunciation are the most important objectives on sentencing for sexual assault. However, given how the respondent had addressed his offending behaviour, the judge found the aim of specific deterrence was not a significant consideration and that rehabilitation was of "lesser concern as an objective of sentencing": RFS at para. 68.

[38] The judge then noted that this Court had recently issued decisions concerning the appropriate range of sentence for adult sexual offences: specifically, *R. v. T.H.*, 2024 BCCA 123; *R. v. Henry*, 2024 BCCA 132; and *Maslehati*: RFS at para. 69. After identifying the facts and outcome of each decision and quoting extensively from *Maslehati*, he highlighted several key principles including:

- "[A] carefully crafted conditional sentence with punitive conditions can give meaningful effect to the principles of denunciation and deterrence": RFS at para. 76, citing *Maslehati* at para. 110.
- However, "an indictable adult sexual assault with aggravating circumstances appropriately attracts a sentence of at least two years' imprisonment, even for a first-time offender.": RFS at para. 73, citing *Maslehati* at para. 102.

· While "it would be an error in principle for judges to instruct themselves that conditional sentences are not available in adult sexual assault prosecutions by indictment" (RFS at para. 75, citing Maslehati at para. 109), "a conditional sentence will rarely constitute a fit sentence for a sexual assault involving aggravating circumstances" (RFS at para. 74, citing Maslehati at para. 105), and a conditional sentence will not generally constitute a fit sentence in this type of case "without a factual finding of diminished moral blameworthiness or compelling mitigation" (RFS at para. 78, citing Maslehati at para. 113).

· "[A] judge's assessment of whether a conditional sentence constitutes a fit sentence for an adult sexual assault with aggravating circumstances must account for society's better understanding of the harmfulness and the wrongfulness of sexual violence.": RFS at para. 77, citing Maslehati at para. 110.

[39] The judge then found that the respondent's moral culpability for all three offences is high, but that there is compelling mitigation: RFS at paras. 80-81. Specifically, in relation to mitigation, he said:

[81] However, I find that there is compelling mitigation here. I find the cooperation with [Ms. Luke] by [the respondent] is significant. Without his cooperation and willingness to admit his offences, including Count 4 which [Ms. Luke] had absolutely no idea about, there could have been no prosecution. The police had no case to present to Crown. [The respondent] was aware of the potential, if not likelihood, of [Ms. Luke] going to the police with the information he had given her, yet he confessed.

The judge went on to characterize the respondent's confession and admission of responsibility as, "compelling if not, in fact, exceptional mitigation": RFS at para. 84.

[40] Having found compelling mitigation, the judge determined the range of sentence for Count 1, the sexual assault, to be between "two years less one day and the 30 months imposed by the Court of Appeal in Maslehati.": RFS at para. 85. The reference to 30 months was a mistake. In Maslehati, this Court imposed a sentence of 28 months, not 30: at para. 157. The sentencing judge concluded that the appropriate sentence on Count 1 was two years less one day, taking into account "the seriousness of the harm done by [the respondent] and the aggravating and mitigating factors and [the respondent's] personal circumstances": RFS at para. 85. For Count 3, the sentencing judge imposed a six-month sentence and for Count 4 he imposed a three-month sentence: RFS at para. 96.

[41] In addressing the question of whether the sentences should be consecutive or concurrent, the sentencing judge observed that if consecutive sentences were imposed a CSO would not be available as the cumulative sentence would exceed two years: RFS 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": RFS at para. 87. He also noted the principle of restraint enshrined in ss. 718.2(d) and (e), which states that imprisonment should be the sanction of last resort: RFS at paras. 88-89. 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": RFS at para. 90.

[42] Finally, having concluded that a fit cumulative sentence was two years less a day, the judge determined that a conditional sentence order was appropriate because allowing the respondent to serve his sentence in the community would not pose a risk to the public or Ms. Luke and would not be inconsistent with the objectives of sentencing: RFS at paras. 91-93.

[43] Along with the conditional sentence, the judge imposed a firearms prohibition under s. 109 of the Criminal Code, a DNA order under s. 487.051 of the Criminal Code, and a victim surcharge. He declined to make a SOIRA order: R. v. Sewell (24 June 2025), Fort St. John 37506-1 (B.C.P.C.). None of the ancillary orders or the SOIRA exemption are under appeal.

Standard of Review

[44] Sentencing is an inherently individualised exercise of discretion, informed by the facts of the case and established principles and objectives of sentencing. In most cases, there is a range of reasonable options from which the judge must select based on their weighing of many variables. Thus, the standard of review on a sentence appeal is highly deferential. 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: R. v. Lacasse, 2015 SCC 64 at para. 11; R. v. Friesen, 2020 SCC 9 at para. 26; R. v. Sheppard, 2025 SCC 29 at paras. 38-39.

[45] An error in principle may include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor": Friesen at para. 26; Sheppard at para. 39. However, an appellate court may not interfere with a sentence simply because it would have weighed the relevant factors differently. An error in principle in the weighing of relevant factors will be established only if the sentencing judge exercised their discretion unreasonably by not giving enough weight to one relevant factor or overemphasizing another relevant factor: Lacasse at para. 49; Friesen at para. 26.

[46] Where the sentencing judge made a material error in principle, an appellate court must determine a fit sentence. In doing so, it must apply the principles of sentencing afresh, with due deference to the sentencing judge's findings of fact and identification of aggravating and mitigating factors to the extent that they are not tainted by error: Friesen at paras. 27-28; Sheppard at para. 41.

Positions of the Parties

Crown's position

[47] The Crown alleges the sentencing judge erred in principle by:

1. overstating the mitigating effect of the respondent's confession to Ms. Luke;

2. allowing the respondent's confession to overwhelm the analysis;
 3. imposing concurrent sentences for the voyeurism offences, which failed to recognize the distinct harm caused by those offences; and
 4. imposing concurrent sentences for the voyeurism offences to preserve the availability of a CSO, thus incorrectly circumventing the precondition for a CSO of excluding the availability of a penitentiary term.
- [48] The Crown's position is that a sentence "in the range of" three years' imprisonment is a fit sentence for the sexual assault and that the terms of imprisonment of six months and three months each on the voyeurism counts should be imposed consecutively, resulting in a cumulative sentence between three and four years' imprisonment.

Respondent's position

- [49] The respondent's position is that the sentencing judge appropriately weighed all the relevant factors and committed no error in principle. He submits that the finding of compelling mitigation supports the judge's decision to impose a CSO, it is not an error in principle to sentence outside the generally-applicable range, and the determination of a term of imprisonment is necessarily intertwined with the decision of where the sentence will be served.
- [50] The respondent's position is that the judge's decision must be assessed on a highly deferential standard, and the appeal should be dismissed.

Discussion

Mitigating effect of the respondent's confession

- [51] The Crown identifies three aspects of the sentencing judge's analysis which the Crown argues resulted in the judge overstating the mitigating effect of the respondent's confession:
- a) First, the Crown says the judge's conclusion that the prosecution's case was entirely dependent on the respondent's confession was unsupported by the evidence.
 - b) Second, the Crown says the mitigating effect of the respondent's confession should have been attenuated by the fact that Ms. Luke's memory loss was directly caused by the respondent.
 - c) Third, the Crown says the mitigating effect of the respondent's confession should have been attenuated by the fact that the respondent resiled from part of his confession when he testified, during the Gardiner hearing, that he lied to Ms. Luke about the type of drugs he gave her.

- [52] With respect to the first aspect, the Crown points to the evidence that existed, independent of the respondent's confession: Ms. Luke remembered waking up to the respondent taking off her shorts and underwear, the respondent kept photographs of Ms. Luke's naked body on his computer and they had been viewed by staff members, and Dr. B. gave a statement to police that the respondent told her "about the sexual assault".
- [53] I pause to note that, although the distinction is subtle, Dr. B.'s evidence on the Gardiner hearing was not that the respondent admitted to her that he had sexually assaulted Ms. Luke. Dr. B.'s evidence was that the respondent told her he put ketamine in Ms. Luke's drink and took photographs of her, and that Dr. B. was given the impression the photos were of a sexual nature.
- [54] While it is true that there was some independent evidence of the sexual assault, it is also true that there was evidence that the police investigation had stalled before Ms. Luke obtained the respondent's recorded confession.
- [55] The sentencing judge found that the photographs had "long since been destroyed" (RFS at para. 86), and aside from the respondent's confession there was no evidence to support Count 4--the voyeurism charge arising from the respondent taking photos of Ms. Luke through her bedroom window: RFS at para. 81.
- [56] Cst. Waterman, the lead investigator on the case, testified at the Gardiner hearing that he had been on the case for almost two years before it was proposed that Ms. Luke attempt to obtain a confession from the respondent. Cst. Waterman acknowledged that in the course of applying for judicial authorization to record the meeting between Ms. Luke and the respondent, he swore in an affidavit that other investigative methods had been tried and had failed. At the Gardiner hearing Cst. Waterman testified that at the time he swore the affidavit he believed this statement to be true. This is despite Ms. Luke reporting what she remembered to the police, Dr. B. giving a statement to the police, and the police obtaining several other statements. Ms. Luke testified that she understood, from talking to the police, that they needed an admission from the respondent to have a "viable" case and later she said that she understood they would have a "better case" if she obtained a confession from the respondent.
- [57] In my view, in these circumstances, it was open to the sentencing judge to characterize the prosecution's case as dependent on the respondent's confession.
- [58] With respect to the second aspect, the Crown argued that the sentencing judge's assessment of the respondent's confession as a mitigating factor failed to appreciate that the only reason there was no other evidence of the details of the sexual assault was because the respondent drugged Ms. Luke, rendering her incapacitated. The Crown says the sentencing judge "effectively rewarded the respondent for drugging [Ms. Luke] and then taking advantage of her resulting incapacity".

- [59] I do not agree with the Crown's characterisation. The sentencing judge expressly noted that drugging Ms. Luke was an aggravating factor and found the respondent's moral culpability was high.
- [60] Finally, with respect to the third aspect, the Crown says the mitigating effect of the respondent's confession should have been attenuated by the fact that the respondent resiled from part of his confession when he testified, during the Gardiner hearing, that he lied to Ms. Luke about the type of drugs he gave her. His explanation for that lie was not accepted by the sentencing judge, but respectfully, I do not see how this should have materially altered the weight given to the confession. It does not change the fact that the confession played an integral role in moving the case towards prosecution.
- [61] This Court has recognized that it can be appropriate to give significant mitigating weight to a high level of co-operation with a police investigation, and such may even justify "a significant discount from the usual range": *R. v. Hein*, 2008 BCCA 230 at para. 26, citing *R. v. Isaza* (1993), 86 C.C.C. (3d) 19, 35 B.C.A.C. 217 and *R. v. Lobon-Valencia*, 1999 BCCA 315.
- [62] Here, the sentencing judge found the confession to have significant, and even exceptional, mitigating effect because he concluded that the prosecution's case depended on the respondent's confession. This conclusion was open to him on the record before him. His analysis of the mitigating effect of the confession is not tainted by error and, in fact, is supported by jurisprudential authority. The Crown is inviting us to reweigh the mitigating effect of the confession, which we cannot do.

Allowing the confession to overwhelm the analysis

- [63] The Crown contends that the sentencing judge allowed the respondent's cooperation with Ms. Luke to overwhelm the analysis, and thus he failed to properly weigh this mitigating factor against the elevated gravity of the respondent's conduct and his significant moral culpability. The Crown argues that while the respondent's confession to Ms. Luke was entitled to some credit, it could not justify a sentence below the generally-applicable range for an adult sexual assault with significant aggravating circumstances, including surreptitious drugging, an egregious breach of trust, and an exacerbated violation of Ms. Luke's privacy and personal dignity by taking demeaning photographs.
- [64] Respectfully, I do not accept these arguments. In my view, the Crown is again asking this Court to reweigh the sentencing factors considered by the judge, which is not our role.
- [65] The difficulty for the Crown arises from the highly deferential standard of review, which the Supreme Court of Canada has emphasized time and time again: see for example *Lacasse* at paras. 11-12 and *Friesen* at paras. 25-26; *Sheppard* at paras. 38-40. This standard applies even where a sentence falls outside the usual range or where a sentencing judge gives different weight to the applicable principles and sentencing objectives than would an appellate court.

- [66] As discussed in *Maslehati*, all sexual assaults, no matter what form, are serious acts of violence that cause victims to suffer profound emotional and physical harm, and the more aggravating the circumstances, the graver the offence: at paras. 64-73. There is no question that the respondent's sexual assault of Ms. Luke was an extremely grave violation of her bodily autonomy, sexual integrity, and dignity that caused her profound and ongoing emotional and psychological harm. Here, the sentencing judge expressly recognized that the sexual assault caused Ms. Luke to suffer immense harm (a statutorily recognized aggravating factor: s. 718.2(a)(iii.1) of the Criminal Code). He quoted directly from Ms. Luke's victim impact statement and he said that in reading her victim impact statement in court she "brought home to everybody present the true nature and horror of the crimes against her": RFS at para. 27.
- [67] The judge accepted as aggravating that:
- a) the respondent surreptitiously used a drug to render Ms. Luke unconscious, leaving her unable to protect herself and leaving her with virtually no memory of the assault;
 - b) the respondent abused a position of trust towards Ms. Luke;
 - c) the assault was prolonged and involved invasive, violative, and demeaning sexual conduct;
 - d) it occurred in Ms. Luke's home, where she should have been safe;
 - e) there was an element of planning; and
 - f) the offences had a devastating impact on Ms. Luke and caused harm to both her and her family.
- [68] The judge expressly mentioned that this was not a case of diminished moral culpability and that, to the contrary, the respondent's moral culpability was high: RFS at para. 80.
- [69] The judge expressly noted that the fundamental principle of sentencing is that a sentence must be proportionate to the offender's moral blameworthiness and the gravity of the offence. He identified the principles of denunciation and deterrence as paramount. In identifying the appropriate sentencing range, he referred to the relevant recent decisions of this Court and quoted extensively from *Maslehati*.
- [70] Ultimately, the sentencing judge distinguished this case from the outcome in *Maslehati* on the grounds that the respondent pleaded guilty and because the sexual assault he committed, though serious, did not involve the same degree of invasiveness as the sexual assault in *Maslehati*: RFS at para. 85. His determination that a sentence of two years less a day was fit for the sexual assault flowed from his finding of compelling mitigation and it expressly accounted for the "seriousness of the harm done by [the respondent] and the aggravating and mitigating factors and [the respondent's] personal circumstances": RFS at paras. 81, 85.

- [71] Additionally, the Crown appears to overlook the mitigating and attenuating effect of certain features, other than the confession, that the sentencing judge found present in this case. In addition to the cooperation with and confession to Ms. Luke, the sentencing judge expressly noted the fact that the respondent had no previous criminal record, pleaded guilty, did not challenge the admissibility of the recorded meeting, was truly remorseful, and likely presented a low risk to reoffend. He specifically found that, in the circumstances, the sentencing objective of specific deterrence is not a significant consideration, and rehabilitation was a lesser concern because the respondent had already taken significant steps directed at rehabilitation.
- [72] An appeal court may not vary a sentence simply because it would have imposed a different one: *R. v. L.M.*, 2008 SCC 31 at para. 14. Where an appeal is based on an error in principle that impacted the sentence, a reviewing court must take care "not to allow their own assessment of the record, and what weight they would have given to various factors, to colour the lens through which they view the sentencing judge's reasoning": *Sheppard* at para. 40.
- [73] While I may have weighed the relevant factors differently given the aggravated circumstances of the case, I consider it evident from the sentencing judge's reasons as a whole that he clearly recognized the principle of proportionality and engaged in a balancing of relevant considerations, alive to both the aggravating and mitigating circumstances of the case, and specific to the offence of sexual assault. The deferential standard of review prevails.

Imposing concurrent sentences for the voyeurism offences without recognising the distinct harm caused by those offences

- [74] The sentencing judge found that fit sentences on the voyeurism offences were six months' imprisonment on Count 3 and three months' imprisonment on Count 4. On appeal, the Crown does not take issue with the duration of these sentences. However, the Crown does take issue with the judge's determination that those sentences be served concurrently with the sentence for the sexual assault.
- [75] The judge's reasons for that determination are brief:
- [86] Counsel for [the respondent] did not make submissions regarding the range of sentence for Counts 3 and 4. The Crown says Count 3 should be a 12-month sentence and Count 4 a nine-month jail sentence. I note the cases provided by Crown involved far more serious allegations. I note that, but for one instance where the employees of Rivers Animal Hospital observed an image of [Ms. Luke] and assumed that it was, in fact, an image of [M.], there is no evidence of any of the images being distributed and I accept that the photographs have long since been destroyed. I find that the range of sentence for these offences does involve a period of incarceration and those sentences are as follows. I find that the appropriate range for Count 3 would be six to nine months' jail and, for Count 4, three to four months' jail.

[87] If I accede to the Crown's submission that the sentences for the sexual assault and the two voyeurism offences should properly be served consecutive to each other, then a conditional sentence order would not be available as the cumulative sentence would exceed two years. Section 718.2(c) of the Criminal Code provides that:

where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh

[88] 718.2(d) reads:

an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances

[89] And s. 718.2(e) directs me to consider:

all available sanctions, other than imprisonment, that are reasonable in the circumstances

[90] Having concluded that there is compelling mitigation in this case, I have further concluded that consecutive sentences for Counts 3 and 4 would be inappropriate as they would effectively undo the value of the guilty plea by creating an unduly long and harsh sentence. I will therefore impose concurrent sentences for Counts 3 and 4; that is, all sentences will be concurrent to each other.

[76] I agree with the Crown's submission that the sentencing judge erred in principle by imposing concurrent sentences, without accounting for the distinct legal interests impacted by the voyeurism offences.

[77] When sentencing an offender for multiple offences, it is appropriate, first, to determine the just sentence for each offence individually, then, second, to consider whether the sentences ought to be consecutive or concurrent, and then, finally, to apply the totality principle if necessary: *R. v. Bertrand Marchand*, 2023 SCC 26 at paras. 91-92; *R. v. Moazami*, 2025 BCCA 189 at para. 80.

[78] The sentencing judge's analysis commenced correctly--he started by determining a sentence for each offence individually. However, he then proceeded directly to a consideration of the totality principle, without first determining whether a principled basis existed for imposing concurrent rather than consecutive sentences.

[79] Whether to impose consecutive or concurrent sentences is an individualized inquiry to be undertaken in the context of each case but, generally speaking, offences that are so closely linked to each other as to constitute a single criminal endeavour may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences: *Bertrand Marchand* at para. 95. However, offences constituting invasions of different legally protected interests can be sentenced consecutively, even if they form part of the same criminal transaction: *Bertrand Marchand* at para. 97; *R. v. Kandola*, 2014 BCCA 443 at para. 40. While sentencing judges retain the discretion to impose concurrent sentences for offences constituting invasions of different legal interests, they must remain cognizant of

the fact that different legally protected interests have been invaded, and if they impose concurrent sentences in such a case, they are obliged to provide a reason: Bertrand Marchand at para. 98.

- [80] A sentence imposed for voyeurism committed during a sexual assault should generally be imposed as a consecutive sentence to properly account for the distinct legal or societal interest impacted by the voyeurism: *R. v. Berry*, 2015 BCCA 210 at para. 26; citing Kandola. Specifically, while sexual assault affects a victim's bodily integrity, voyeurism affects a victim's personal privacy interests: *Berry* at para. 26.
- [81] While the exercise of the sentencing judge's discretion to impose concurrent sentences is entitled to deference, in exercising that discretion the judge failed to consider relevant factors, which is an error in principle. Specifically, 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. He also 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.
- [82] The reason given for imposing concurrent sentences emerged from the application of the totality principle. Specifically, the judge reasoned that consecutive sentences would "undo the value of the guilty plea by creating an unduly long and harsh sentence": *RFS* at para. 90. In the result, the sentencing judge failed to consider whether a cumulative sentence of two years and nine months' imprisonment (less one day) would be unduly long and harsh in light of the distinct legal interests impacted by the voyeurism offences and the fact that the counts did not all arise out of the same incident. This is an error in principle that impacted the cumulative sentence.
- Imposing concurrent sentences for the voyeurism offences in order to preserve the availability of a CSO
- [83] The Criminal Code expressly limits conditional sentence orders to cases where "the court imposes a sentence of imprisonment of less than two years": s. 742.1.
- [84] Before considering whether a conditional sentence order is appropriate, it is incumbent on a sentencing judge to conduct a preliminary assessment of the appropriate range of available sentences and exclude probation and a penitentiary term (a term of imprisonment of two years or more): *R. v. Lee*, 2025 BCCA 292 at para. 48; *Maslehati* at para. 57; *R. v. Fice*, 2005 SCC 32 at para. 2. If, on this preliminary determination, "probation or a penitentiary sentence [is] considered appropriate" then the offender is "barred from receiving a conditional sentence": *Fice* at para. 2.
- [85] Where an offender is sentenced for multiple offences, this rule applies to the total or aggregate sentence: *R. v. Jaramillo*, 2025 BCCA 77 at paras. 39-40.

[86] It was incumbent upon the judge 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. He failed to engage in this analysis. He reasoned that consecutive sentences would "undo the value of the guilty plea" but, as already discussed, that was said in the absence of any consideration of the distinct legal interests impacted, and harm caused, by the voyeurism offences. It appears from the reasons for sentence quoted in para. 75 above that the 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. This is an error in principle that impacted the cumulative sentence.

What is a Fit Sentence?

[87] As discussed, where the sentencing judge made a material error in principle, an appellate court must determine a fit sentence and, in doing so, it must apply the principles of sentencing afresh, with due deference to the sentencing judge's findings of fact and identification of aggravating and mitigating factors to the extent that they are not tainted by error.

[88] As I have explained, in my view, no error in principle has been identified in relation to the sentencing judge's imposition of a sentence of two years less a day imprisonment for the sexual assault. There is no basis to interfere with that sentence. The Crown has not alleged on a stand-alone basis that the sentence for the sexual assault is demonstrably unfit.

[89] As already noted, the Crown does not take issue with the duration of the sentences imposed for the voyeurism offences--Counts 3 and 4. Accordingly, there is no basis to interfere with the quantum of those sentences.

[90] The first question then is whether the sentences for the voyeurism offences should be served consecutively or, instead, concurrent to each other and/or to the sentence for the sexual assault? In my view, to achieve a cumulative sentence that is proportionate to the gravity of the appellant's offences and his degree of personal responsibility, the sentences for voyeurism should be served consecutively to each other and to the sexual assault sentence.

[91] The offence underlying Count 4 and those underlying Counts 1 and 3 occurred at different times. Additionally, as I have discussed, the voyeurism offences constituted invasions of Ms. Luke's privacy interests, distinct from the invasion of her bodily integrity caused by the sexual assault. In my view, consecutive sentences are required to recognize the distinct harm caused to Ms. Luke for each offence.

[92] The next question is whether a cumulative penitentiary sentence of 33 months (less one day) would be unduly long or harsh, in the sense that it becomes disproportionate to the gravity of the offences and the degree of responsibility of the offender: *Bertrand Marchand* at para. 99. In my view, it would not be unduly long or harsh.

- [93] The focus when assessing the gravity of an offence is on the harmfulness and the wrongfulness of the offender's conduct. As reiterated in *Maslehati* and many other decisions of this Court and the Supreme Court of Canada, all sexual assaults are serious acts of violence. Every sexual assault is a non-consensual subjection of the victim to the offender's sexual desires, and every sexual assault wrongly exploits the victim and harms their personal autonomy, sexual integrity, and dignity. Although the offences occurred many years ago, their harmfulness and wrongfulness are to be viewed through a contemporary lens and society's greater appreciation of the impact: *Sheppard* at paras. 67-79.
- [94] There were several aggravating factors present that significantly elevated the inherent gravity of the sexual assault in this case, particularly, the surreptitious drugging of Ms. Luke, and the breach of trust. The voyeurism offences further elevated the gravity and caused distinct harm. As the sentencing judge recognized, the respondent's moral culpability for all three offences is high.
- [95] As I have explained, I would not interfere with the sentencing judge's characterisation of the respondent's mitigation as compelling or his finding that the respondent presents a low risk to reoffend. A deferential standard of review applies. However, but for those factors, given the significantly aggravating circumstances, it is my view that proportionality would require a sentence in the top half of the applicable range for the sexual assault alone (between four and six years' imprisonment, as confirmed in *Maslehati*). When the voyeurism offences are added to the proportionality assessment, a cumulative sentence of 33 months (less one day) is not disproportionate and is far from unduly long and harsh, despite the compelling mitigation.
- [96] In the circumstances, a conditional sentence order is not available as a possible sentence because the cumulative sentence exceeds two years.

Disposition

- [97] For the reasons provided, I would grant the Crown leave to appeal, and I would allow the appeal. I would set aside the conditional sentence order and substitute a custodial sentence of two years less a day imprisonment on Count 1; a custodial sentence of six months' imprisonment on Count 3, consecutive to the sentence on Count 1; and a custodial sentence of three months' imprisonment on Count 4, consecutive to the sentences on Counts 1 and 3.
- [98] These sentences are to run from April 4, 2025. I would leave it to the correctional authorities to calculate the amount of credit the respondent is statutorily entitled to for time already served on the CSO. The intention is that for the purposes of statutory release, the respondent be treated as an offender who received a cumulative sentence of 33 months (less one day) when the sentences were imposed on April 4, 2025.
- [99] None of the ancillary orders imposed by the sentencing judge are under appeal. Consequently, they should remain in place.

"The Honourable Justice Warren"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Grauer"

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