NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Sullivan*, 2025 NSCA 13

Date: 20250220
Docket: CAC 528842
Registry: Halifax

Between:

John Thomas Sullivan

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	February 20, 2025, in Halifax, Nova Scotia
Facts:	The appellant was charged with voyeurism, break and enter, and obstruction of justice. During the trial, a misunderstanding arose regarding the continuity and authenticity of the SD card, leading to delays in the proceedings (paras 2-3, 5-6).
Procedural History:	Provincial Court, November 15, 2022: The appellant was convicted of four offences (para 3).
Parties Submissions:	Appellant: Argued that the delay related to the SD card was not an exceptional circumstance and should not have been deducted from the net delay in the Jordan analysis (para 1). Respondent: Contended that the misunderstanding regarding the SD card was a genuine and unforeseeable event, justifying the delay as an exceptional circumstance (para 12).

Legal Issues:	Whether the delay related to the SD card constituted an exceptional circumstance under the Jordan framework (para 1).
Disposition:	The appeal was allowed, and the charges against the appellant were stayed (para 18).
Reasons:	Per Farrar, Van den Eynden, and Beaton JJ.A.:
	The Court found that the trial judge erred in characterizing the delay related to the SD card as an exceptional circumstance. The misunderstanding regarding the SD card's authenticity and continuity was not unforeseeable or unavoidable, as required by the Jordan framework. The Crown was responsible for ensuring the technical requirements for presenting the evidence were met. The delay was added back into the Jordan analysis, resulting in a delay exceeding the presumptive ceiling by two and a half months. Consequently, the charges against the appellant were stayed (paras 13-17).

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Sullivan*, 2025 NSCA 13

Date: 20250220
Docket: CAC 528842
Registry: Halifax

Between:

John Thomas Sullivan

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judges:	Farrar, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	February 20, 2025, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment by the Court
Counsel:	James Giacomantonio, for the appellant Cory Roberts, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

By the Court (Orally)

[1] In our view, it is only necessary to address one issue raised by the appellant - that is the judge's characterization of the Crown's misunderstanding with respect to the continuity and authenticity of an SD card (electronic storage card) as an exceptional circumstance.

[2] We will not review in detail the underlying factual basis which led to the charges against Mr. Sullivan. They are set out in detail in Judge Anne Marie Simmons' thorough oral decision.

[3] On May 15, 2019, Mr. Sullivan was charged with numerous offences including voyeurism, break and enter, and obstruction of justice. He was convicted of four of offences by Judge Simmons on November 15, 2022, approximately 42 months after the laying of the Information.

[4] The trial ended on June 27, 2022, when closing arguments were made. This was 37 months, and 14 days from the date of the offence and nearly 20 months over the presumptive *Jordan* ceiling of 18 months.[1]

[5] Although the judge, in her oral decision, addressed other issues of delay during the course of the proceeding, it is the delay related to the SD card which is determinative of the appeal.

[6] On August 10, 2021, the first day of trial, the Crown sought to introduce the SD card through the lead investigator in the case. The SD card contained videos crucial to the Crown's case against Mr. Sullivan. At the commencement of the evidence it immediately became known the Crown had misunderstood a pre-trial agreement with the defence relating to the SD card. The defence had earlier consented to the continuity of the exhibit, but not its authenticity.

[7] As a result, the Crown called an additional witness, Cpl. Jason Baird, as an expert, to attempt to authenticate the SD card.

[8] On August 12, 2021, Cpl. Baird was testifying during which the Crown attempted to authenticate the SD card by showing it to the witness using a computer projected onto a screen. Cpl. Baird was of the view that the actions of the

---

[1] *R. v. Jordan*, 2016 SCC 27.

Crown in trying to introduce the SD card in this manner was not “forensically sound” and could corrupt the information on the SD card. This response was unexpected by the judge, Crown and defence. This caused an immediate adjournment of his evidence.

[9] Cpl. Baird was recalled on December 2, 2021, three months and 20 days after his evidence on August 12, 2021 derailed the trial. Eventually the Crown was able to authenticate the SD card.

[10] On August 3, 2021, the defendant gave written notice he intended to advance a s. 11(b) argument.

[11] On November 7, 2022, in an oral decision the judge dismissed the 11(b) motion.

[12] In addressing the delay caused by the SD card, the judge found:

> Had the misunderstanding with respect to continuity and the authenticity of the SD card not occurred, there would have been no need for delay with respect to Cpl. Baird as expert witness and likely no issue with respect to admissibility of the SD card and authenticity in relation to the argument that its contents had been changed by accessing the data in the courtroom.
>
> I consider the argument that the fault lies with the Crown for having used the SD card as I have described. However, as I've said earlier, I am persuaded that Crown counsel genuinely misunderstood the concession made with respect to admissibility of the SD card. I had the benefit of watching the argument unfold in the courtroom and I conclude that the misunderstanding was genuine.
>
> As above, the Defence is not at fault for the position taken with respect to admissibility and I conclude that the Defence did not resile from the position taken in advance of the trial. In the circumstances of a genuine misunderstanding, I do not think it fair to fault the Crown for the need to rejig the case on the fly. I consider the misunderstanding a reasonably unexpected and reasonably unforeseeable event. Accordingly, the delay occasioned by this event should be deducted from the net delay.

[13] With respect to the judge, her exceptional circumstances analysis is flawed. In *Jordan*, the Supreme Court of Canada explained what constitutes exceptional circumstances:

> **69** Exceptional circumstances lie *outside* the Crown’s control in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, and (2) Crown counsel

> cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.
>
> **70** It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful – rather, just that it took reasonable steps in an attempt to avoid the delay.

[14] The application judge made several key findings with respect to the SD card:

- Had the misunderstanding with respect to the continuity and authenticity of the SD card not occurred, there would have been no need to delay Cpl. Baird's evidence.
- There would have been likely no issue with respect to the argument the contents may have been changed by accessing the data in the courtroom in a forensically unsound manner.
- The fault for the issues with the SD card laid solely with the Crown.
- The defence was not at fault for any issues relating to the SD card.

[15] The misunderstanding in the nature of the admission made by the defence aside, the Crown was responsible to meet the technical requirements necessary to present the evidence without potentially contaminating it. The authentication of the SD card and the manner of doing so should have been foremost in the Crown's mind and as such could not be said to be unforeseen or reasonably unavoidable circumstance.

[16] The judge erred in failing to properly apply the test for exceptional circumstances as set out in *Jordan*. Her analysis focused on the genuineness of the Crown's misunderstanding, but failed to follow *Jordan's* edict that the delay must be unforeseeable or unavoidable. The issues with the SD card were neither. It is difficult to imagine how the Crown's misunderstanding about a clear and unequivocal position taken by the defence could rise to the level of an exceptional

circumstance. The SD card was a critical piece of evidence and the Crown should have turned its mind to its introduction into evidence as the cornerstone of its case.

[17] We are unanimously of the view the judge's finding that the period between August 12, 2021 and December 2, 2021 constituted an exceptional circumstance was an error and that delay should be added back into the *Jordan* analysis, resulting in a delay of 20 months and 15 days, exceeding the ceiling by two and a half months.

[18] As a result, the appeal is allowed and the charges against Mr. Sullivan are stayed.

Farrar, J.A.

Van den Eynden, J.A.

Beaton, J.A.