NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Zaki*, 2025 NSCA 63

Date: 20250801
Docket: CAC 537037
Registry: Halifax

Between:

Jamal Zaki

Appellant

v.

His Majesty the King

Respondent

Judges:	Wood, C.J.N.S., Van den Eynden and Gogan, JJ.A.
Appeal Heard:	June 16, 2025, in Halifax, Nova Scotia
Facts:	The accused was charged with sexual assault under s. 271 of the *Criminal Code* on April 13, 2022, and elected to proceed with a trial in the Provincial Court of Nova Scotia. The trial concluded 22.5 months later, on February 26, 2024 (paras 3, 13).
Procedural History:	• Provincial Court, March 25, 2024: The accused was convicted of sexual assault. An application to stay the proceedings based on a breach of s. 11(b) *Charter* rights was dismissed (paras 4, 36).
Parties' Submissions:	• Appellant: Argued that the trial judge erred in dismissing his stay application and specifically in attributing delay to the defence regarding a request for

notes of statements he made to the complainant's therapist. (paras 6-7).

- Respondent: Contended that the trial judge's analysis of delay was correct in allocating delay to the defence from their failure to pursue the third-party records application in a timely manner.(paras 34-35).

Legal Issues:

- Whether the trial judge erred in failing to grant the appellant's s. 11(b) *Charter* application (para 6).

Disposition:

- The appeal was allowed, the conviction was quashed, and a stay of proceedings was entered (para 78).

Reasons:

Per Gogan J.A. (Wood C.J.N.S. and Van den Eynden J.A. concurring):

The trial judge made errors in the delay analysis, particularly in attributing delays to the defence without proper inquiry into the time required to review newly produced notes and failing to take steps to mitigate delay not caused by the defence (paras 41-55). The trial judge's findings that the defence requested an adjournment and accepted the continuation date without objection were found to be palpable and overriding errors (paras 45-49). The fresh analysis of delay showed that the net delay exceeded the *Jordan* presumptive ceiling, and there were no exceptional circumstances to justify it. Therefore, the appellant's right to a trial within a reasonable time was breached, warranting a stay of proceedings (paras 69-77).

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

Judges:	Wood, C.J.N.S., Van den Eynden and Gogan, JJ.A.
Appeal Heard:	June 16, 2025, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Gogan, J.A.; Wood, C.J.N.S. and Van den Eynden, J.A. concurring.
Counsel:	Zeb Brown, for the appellant Glenn Hubbard, 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:

Introduction

[1] Accused persons in Canada are guaranteed the right to trial in a reasonable time. Complacency is the antithesis of this *Charter* protected right.

[2] In *R. v. Jordan*, the Supreme Court of Canada introduced a new analytical framework for assessing delay in criminal proceedings.[1] The goal was a culture change supported by the imposition of ceilings beyond which the length of trial delay was presumed unreasonable. For matters tried in provincial courts, the *Jordan* ceiling is 18 months.[2] Exceeding the ceiling presumes prejudice to the liberty, security, and fair trial interests of the accused person.[3] One of the objectives of this new approach was to "enhance accountability by fostering proactive, preventative problem solving."[4]

[3] Jamal Zaki was charged with sexual assault contrary to s. 271 of the *Criminal Code* on April 13, 2022. He elected to proceed with a trial in the Provincial Court of Nova Scotia. His trial concluded 22.5 months later.[5]

[4] Mr. Zaki was convicted on March 25, 2024. He brought an application to stay the proceeding on the basis that his s. 11(b) *Charter* rights had been breached. The trial judge, Judge Gregory Lenehan, dismissed the application, finding defence conduct was responsible for two periods of delay. Subtracting these periods from the total delay meant the trial time did not exceed the *Jordan* ceiling. Mr. Zaki appeals the s. 11(b) decision. The Crown cross-appeals the two-year conditional sentence order imposed on Mr. Zaki. There is no appeal of Mr. Zaki's conviction.

[5] I would allow the appeal. The trial judge made errors in his delay analysis. Applying the *Jordan* framework to a fresh analysis, I would find the delay in this case unreasonable and enter a stay of proceedings. Given the outcome of the appeal, I need not address the Crown's cross-appeal on sentence, nor the related fresh evidence motion filed by Mr. Zaki.

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[1] *R. v. Jordan*, 2016 SCC 27 [*Jordan*].
[2] 18 months or 547 days.
[3] See *Jordan* at para. 54.
[4] *Jordan* at para. 112.
[5] On February 26, 2024.

Issue on Appeal

[6] The lone issue identified by Mr. Zaki is whether the trial judge erred in failing to grant his s. 11(b) application.

[7] The thrust of Mr. Zaki's arguments on appeal is two-fold: (1) the trial judge erred in holding the defence responsible for the delay resulting from a request for notes made by the complainant's therapist; and (2) the judge erred in his assessment of the delayed start to the trial resulting from double-booking Mr. Zaki's trial with other matters.

Standard of Review

[8] The standard of review for decisions involving s. 11(b) *Charter* rights has been described as "multifaceted".[6] As explained in *R. v. Pearce*:

> The standard of review for s. 11(b) appeals is a three-step process as this Court has stated previously: palpable and overriding error for findings of fact and the categorization or attribution of delay, and correctness for the allocation or characterization of the delay and the ultimate determination of whether the delay was unreasonable and warrants a judicial stay. Deference is owed to a trial judge's assessment of responsibility for the delay because it involves findings of fact.[7]

[9] As will be explained, the judge in this case made both palpable and overriding errors in his findings and errors of law in the allocation of delay.

Analysis

[10] I begin the analysis by highlighting some basic principles followed by a review of the conduct of the trial and the trial judge's reasons for dismissing the *Jordan* application. I then discuss the errors made by the trial judge and conclude with a fresh assessment of delay.

The Jordan Framework – The Basic Principles

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[6] *R. v. Callahan-Tucker*, 2025 NSCA 35 at para. 126.
[7] *R. v. Pearce; R. v. Howe*, 2021 NSCA 37 at para. 53. See also *R. v. Pauls*, 2020 ONCA 220 at para. 40, aff'd in *R. v. Yusuf,* 2021 SCC 2; and *R. v. Ellis,* 2020 NSCA 78.

[11] The analysis in this case is governed by the *Jordan* framework. In *R. v. Ellis*, this Court identified the fundamental concepts:

> […] compliance with s. 11(b) of the *Charter of Rights and Freedoms* requires the completion of trials in Provincial Court within eighteen months. That outer limit was referred to in *Jordan* as the "presumptive ceiling." A delay above this ceiling is presumptively unreasonable.
>
> [3] …Whether the "presumptive ceiling" has been exceeded involves calculating the total delay from the date an accused is charged to the end of evidence and submissions (*R. v. K.G.K.*, 2020 SCC 7, at para. 31) minus delay that can be attributed to the defence (*Jordan*, at para. 47). Defence delay may be the result of waiver and/or defence conduct. If the net delay (total delay less defence delay) exceeds the presumptive ceiling, then exceptional circumstances, complexity or the transitional nature of the case may justify the delay.[8]
>
> [Some citations omitted]

[12] Mr. Zaki's case is not about exceptional circumstances, complexity, or transitional principles. Simply stated, it is about whether the net delay exceeds the presumptive ceiling. As I will explain, the key aspect of the analysis is not defence conduct but the failure to take measures to mitigate delay when it should have been apparent such action was required.

The Conduct of the Trial

[13] The events underlying the charge against Mr. Zaki took place in August of 2020. Mr. Zaki was charged on April 13, 2022, and the trial concluded 22.5 months later on February 26, 2024. There is no dispute about the trial judge's calculation of the total delay.[9]

[14] Mr. Zaki's first appearance took place on May 17, 2022. By this point, he had initiated an application for legal aid counsel and by May 31, 2022, he had signed a designation of counsel. A second appearance took place on June 16, 2022, but no disclosure had been provided, and no plea was entered. On July 15, 2022, legal aid counsel appeared for Mr. Zaki, confirming receipt of disclosure and

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[8] *R. v. Ellis*, 2020 NSCA 78.

[9] The trial judge's calculation of total delay was 684 days. He said this equated to 23.5 months which is an error – 684 days equates to 22.5 months.

requesting an adjournment of election and plea until September. Counsel waived delay in the absence of Mr. Zaki.[10]

[15] On October 5, 2022, new counsel appeared for Mr. Zaki and requested further time to review the matter and obtain instructions. As a result, Mr. Zaki's arraignment was adjourned to November 1, 2022. On the return date, Mr. Zaki elected trial in provincial court and pled not guilty. After hearing from counsel, the court set the trial for a full day on December 18, 2023. There was no discussion about the *Jordan* ceiling despite the fact the trial date was over a year away and over 20 months from the date of the charge. A date for a pre-trial conference was also set.

[16] In August of 2023, Mr. Zaki hired a third lawyer who was available to proceed on the existing trial date. Mr. Zaki's lawyer made a number of pre-trial applications. These were scheduled and disposed of without any impact on the trial date. In this same period, defence counsel requested notes made by the complainant's therapist, Dr. Holly McConville. Although the record is not clear on the scope of the initial request, it related to an unusual situation involving a call made to Mr. Zaki during one of the complainant's counselling sessions. The request was sent to Dr. McConville who refused to provide the notes to the Crown.[11] The Crown advised the defence of the refusal in a timely way. With this knowledge, the defence did not take any further steps to obtain the notes prior to trial.[12]

[17] Mr. Zaki's trial proceeded on the date originally scheduled—December 18, 2023. However, the trial had been "double-booked" with other matters. The judge dealt with the other matters before starting the trial. As a result, the trial began an hour late. The late start of the trial did not trigger any discussion about the possibility it would not finish in the one day allocated to it. Nor did any discussion

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[10] Before the trial judge there was a dispute about the waiver provided by counsel on July 15, 2022. The trial judge found counsel had not been instructed to waive delay but also found that Mr. Zaki was unavailable to provide counsel with instructions and attributed a period of delay to defence on this basis. The trial judge's finding on this point is not under appeal.

[11] The record on appeal is not clear about the reason for the refusal to produce the notes. The only point material to this appeal is that the Crown requested the notes and the psychologist refused to produce them without a court order.

[12] On September 18, 2023, between the request for the notes and the psychologist's refusal, the Court held a pre-trial conference during which this issue was discussed. Counsel did not then know whether the psychologist would produce the notes, but it was acknowledged a potential dispute remained about whether they would be records under s. 278.1 of the *Criminal Code*.

take place on the issue of delay before or after the noon break which took about an hour and 15 minutes.[13]

[18] Once underway, the first witness was the complainant. During her direct examination, she described a telephone call with Mr. Zaki that took place during a counselling session. She described the call as follows:

> So my therapist and I were talking, and him and I were having a fight, I don't recall what it was about, and I called him, halfway through this session, and it got a little bit heated, and I finally just told my therapist what happened, and he said that I can't look at you the same after what I did, and he didn't consider what he did was rape, and my therapist said that it was rape.

[19] The defence did not object to the evidence of Mr. Zaki's statements when offered by the complainant. She was cross-examined about how it was that Mr. Zaki was contacted by phone during her counselling session. The complainant's testimony was complete by 3:30 p.m.

[20] The Crown called two more witnesses. The first was a friend of the complainant's who testified briefly and the second was her therapist, Dr. Holly McConville. Before Dr. McConville took the stand, defence counsel raised what was characterized as a disclosure issue. The exchange between defence counsel and the court on this issue was as follows:

> **MR. MURRAY:** Before the witness comes in, Your Honour, my friend and I had a brief discussion about this earlier today. Dr. McConville was interviewed by the police in, I believe, March of 2022.
>
> **MR. MCCARROLL:** Yes.
>
> **MR. MURRAY:** Shortly before the arrest was finally made with respect to Mr. Zaki. She gave a video interview to the police, during which she said: I have notes of this meeting. Mr. Zaki made an admission to me. And so when I came onto this file in August, I requested disclosure of the notes of Dr. McConville. And in due course, I received a response from the Crown, saying Dr. McConville, because these were notes about a conversation between her and the accused, Mr. Zaki, she didn't have his permission to release them, which struck me as odd.
>
> **THE COURT:** Strikes me as odd as well.
>
> **MR. MURRAY:** And as a result, the Crown was not in a position....
>
> **THE COURT:** He wasn't, he wasn't her patient.

[13] This recess began at 12:16 p.m. and the trial resumed at 1:35 p.m.

> **MR. MURRAY:** The Crown was not in a position to disclose that information. And so, and this has led to this morning's conversation. At that point I thought, well, if you're talking about an admission from an accused, and you've got a note of it, but you're not prepared to disclose it, it's not going to be evidence in the trial. And maybe I was mistaken about that.
>
> My friend says that I ought to have, in addition to all of the other applications I made, made an application for production of Dr. McConville's records as third party records, and yet now my friend wants to call her to testify, no doubt about an admission by Mr. Zaki.
>
> So I'm not prepared to hear her talk about an admission made by my client...
>
> **THE COURT:** Without seeing her notes.
>
> **MR. MURRAY:** ...without seeing her notes. **And we're not going to finish today anyway.**
>
> [Emphasis added]

[21] I pause here to note defence counsel's statement "[…] we're not going to finish today anyway," was the first indication on the record that the trial was not going to finish as scheduled.

[22] Crown counsel responded that he had not seen the notes and an application under s. 278.3(1) of the *Criminal Code* was required given the request related to "therapeutic notes from her professional relationship with the complainant." Before hearing the substance of the Crown's position, the judge concluded an application was not required because "the only note that I'm concerned about is what she alleges was an admission by Mr. Zaki."

[23] The Crown responded by elaborating on its position:

> **MR. MCCARROLL:** Your Honour, if I may, Dr. McConville gave a statement to the police. It was disclosed with the initial disclosure, fully outlining exactly what was said during this meeting, exactly what was said or what was alleged to have been said by Mr. Zaki. Everything that the Crown is seeking to rely upon is contained within that statement, which was disclosed at the outset of this.
>
> Defence did request any working notes that the that the doctor had, which was declined by the doctor. Police didn't have it, I didn't have it, there's nothing I can do. That would be subject to a third-party records application. Those records, I have not seen them. I am assuming they are rife with all kinds of information about the complainant. I have no idea how long these records date back. I know that there's a therapeutic relationship that, from the Crown's perspective, deserves to...deserves the protection provided by s.278.

> My friend is fully aware of what this doctor is going to say about the alleged admission by his client.

[24] In response to the Crown's submission, the defence clarified it was not seeking the complainant's health records and only seeking notes of what Mr. Zaki allegedly said in the call made during the session. These were statements the Crown wished to adduce from Dr. McConville as an admission made by Mr. Zaki.

[25] The trial judge proceeded to triage the issue. He questioned Dr. McConville about her notes. She confirmed having notes of what Mr. Zaki said during the phone call and relying on them and her memory to give her statement to police. After this exchange, the trial judge directed Dr. McConville to provide a photocopy of those notes to the Crown who would in turn provide them to defence counsel. The judge did not review, redact, or screen the material before providing his directions. He recessed to allow for production of the notes and indicated on return he would set a date for continuation of the trial.

[26] The Court recessed for less than 10 minutes after which the following exchange took place with respect to the trial status:

> **MR. MURRAY:** Thank you, Your Honour, I do have that. There's a whole page of notes that's been provided. It's probably more generous than it needs to be, but I'll keep it private. **I'd like some time to talk with my client about it. As you say, we're not going to finish today.**
>
> **THE COURT:** **Right. We need to find time for a continuation.** Mr. McCarroll, what's your estimation, Mr. Murray, as far as time to complete the evidence?
>
> **MR. MCCARROLL:** **Another ten minutes for Crown's case**, Your Honour.
>
> **THE COURT:** Is Dr. McConville the last witness for the Crown?
>
> **MR. MCCARROLL:** Yes.
>
> **MR. MURRAY:** Oh.
>
> **THE CLERK:** **February 26th, 2024.**
>
> **THE COURT:** Dr. McConville, what's your schedule like?
>
> **A:** Mondays and Fridays are open. I'm not sure what day that falls on.
>
> **THE COURT:** Monday.
>
> **A:** Yeah.
>
> **MR. MCCARROLL:** February 26th is fine with the Crown.
>
> **THE COURT:** **I'm more concerned with Defence counsel.**

> **MR. MURRAY:** I'm available**. I'm concerned about time because we're...this is month 20. Is there any time sooner?** You can anticipate final submissions, you can anticipate, because of the way I've asked some questions, that Mr. Zaki will be testifying**. I am expecting it's a half day that we need.**
>
> **THE CLERK: Unfortunately not.**
>
> **THE COURT: February 26th, at 9:30 is the earliest time we have available.**
>
> [Emphasis added]

[27] The trial resumed on February 26, 2024, over 22 months after Mr. Zaki was charged. As the day began, defence counsel gave notice of intent to apply for a stay of proceedings resulting from an alleged breach of Mr. Zaki's right to trial within a reasonable time.

[28] The evidence began just after at 10:00 a.m. Dr. McConville testified, confirming she had been the complainant's psychologist. Her direct evidence focused on an April 15, 2021 counselling session with the complainant during which Mr. Zaki joined by telephone and discussed the incident before the court. Dr. McConville testified about various statements made by Mr. Zaki during the call. Her testimony concluded at 10:15 a.m.

[29] The trial continued with Mr. Zaki's testimony during which he confirmed the complainant had accused him of "rape" during a therapy session. But he denied any conversation with Dr. McConville about the allegation, and he denied making any admission. It was his evidence that the complainant blurted out the allegation and he did not respond before the phone call abruptly ended. Mr. Zaki's evidence concluded at noon. The trial then broke until 1:30 p.m. when final arguments began, concluding at 2:02 p.m. The total time to complete the trial on its second day was just under 3 hours.

[30] The trial judge reserved his decision until March 25, 2024, when he found Mr. Zaki guilty of the charge against him. In his reasons for conviction, the trial judge found Mr. Zaki's statements during the therapy session to be an admission of forced intercourse consistent with the complainant's account. Mr. Zaki was sentenced on September 20, 2024.

The s. 11(b) Hearing and Decision

[31] Mr. Zaki's stay application was heard by Judge Lenehan over two days, May 27 and June 17, 2024. On the first date, the court heard the Crown's motion to

dismiss the application summarily. That motion was dismissed. On the second day, the hearing proceeded with evidence from both Mr. Zaki and his first defence counsel.[14]

[32] The focus of the parties' arguments was on two discrete time periods. First, between July 15 to November 1, 2022, a period for which Mr. Zaki's first lawyer had waived delay.[15] Mr. Zaki subsequently challenged the waiver on the basis that no such instruction was given. Judge Lenehen found Mr. Zaki had not waived delay. However, he also found Mr. Zaki had not been available to review disclosure and instruct counsel between July 15 and October 5, 2022. That period of 82 days was attributed to defence and subtracted from the total delay of 684 days, leaving a net delay of 602 days.

[33] The second period under scrutiny was between the original trial date of December 18, 2023 and the adjourned date of February 26, 2024, when the trial concluded. In written argument before Judge Lenehan, defence counsel characterized this period of delay as a failure by the Crown to disclose, necessitating an adjournment of the trial:

> The evidence of Dr McConville was, ultimately, influential for the Court. An adjournment for that potential evidence to be considered by Mr. Zaki and counsel was a necessity. **Without the need to adjourn for the Defence to consider the new disclosure, it is possible that *the Crown's* case - including Dr. McConville's evidence - could have been completed on December 18, 2023.**
>
> The Court may also want to consider that Mr. Zaki's case was not reached on December 18, 2023, until approximately 10:25 am. **Had Mr. Zaki's full day trial started on time, with full disclosure having been provided, any overflow would have required less than the half day set aside for February 26.**
>
> [Emphasis added]

[34] The Crown contested the defence position in its brief to the Court:

> […] With respect, the Crown disagrees, and it is our position that the entire delay is attributable solely to defense.

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[14] Mr. Zaki's trial lawyer became counsel of record on August 21, 2023. His trial counsel was his third defence lawyer. His first lawyer was with Nova Scotia Legal Aid who represented him until October 5, 2022, when Mr. Zaki's matter was transferred to private counsel. Mr. Zaki's second lawyer subsequently took a position with Nova Scotia Legal Aid which necessitated the transfer of his file to trial counsel.

[15] Mr. Zaki's written submissions to the trial judge identified this initial period as April 13 to November 1, 2022. The Crown's written submission identified June 16 to November 1, 2022, as the contentious period. The trial judge's oral decision identified July 15 to November 1, 2022 as the period requiring scrutiny.

> Dr. McConville gave a statement to police on February 28, 2022, outlining in detail the relevant evidence she had to give. This statement was included with the initial disclosure package. Furthermore, it was clear from that statement (and the General Occurrence Hardcopy provided in the initial disclosure package) that Dr. McConville had notes pertaining to the therapeutic session she had with [the complainant] and Mr. Zaki.
>
> Mr. Zaki's current counsel wrote to the Crown requesting those therapeutic notes on September 1, 2023. On September 25th, the Crown received a response from Dr. McConville indicating that the notes were deemed to have privacy interests and that a court order would be required to obtain them. This was relayed to defence on the same day it was received. The Crown heard nothing further from defence counsel until the day of trial.
>
> These were clearly third-party records, not in the possession of the Crown. Mr. Zaki's current defence counsel either made a conscious decision not to pursue those therapeutic notes in advance of trial, or they were negligent in their duty to make the appropriate application in a timely fashion.
>
> Either way, the failure to pursue those notes in a timely fashion is squarely upon defence. In *Cody*, [16] the SCC held that:
>
> > "Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11 (b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay."
>
> The defense's decision to wait until the Crown called Dr. McConville to the stand before raising the issue of 3rd party records is a clear example of marked inefficiency that had the effect of causing delay. Neither the Crown, nor the Court bear any responsibility whatsoever for the delay caused by this defence conduct.

[35] Mr. Zaki was cross-examined during the hearing. When asked about this issue, he indicated he was aware of Dr. McConville's refusal to release her notes before trial. Although he testified to a belief his consent was required, he took no steps to provide his consent.[17] When asked if he was advised that an application was required to obtain the notes, Mr. Zaki acknowledged discussing the application with his lawyer and said "We, just me and him, we decided not to."

[36] The trial judge dismissed Mr. Zaki's stay application in an oral decision delivered on July 22, 2024. The trial judge's conclusion that the case was not complex is not challenged. Neither is his finding that Mr. Zaki was unavailable to review disclosure or instruct counsel between July 15 and October 5, 2022, a

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[16] Referring to *R. v. Cody*, 2017 SCC 31 [*Cody*].

[17] Mr. Zaki's belief was based on his understanding of Dr. McConville's refusal. The record on appeal does not contain her response to the request.

period of 82 days.[18] On the second period under review, 70 days, the trial judge found:

- The trial did not begin until 10:30 a.m. on December 18, 2023, due to other matters on the docket that had to be addressed. Any delay occasioned by the late start would not be defence delay.
- It took 17 minutes to deal with the notes issue once it was raised by defence at trial at about 3:40 p.m. in the afternoon.[19]
- Had the trial started on time and the notes issue been resolved beforehand, the trial could have concluded on the original trial date.
- The hour lost to the late start could have been found in the days after the original trial date and "caused [a] further delay of four days at most."
- The remaining delay, from December 22, 2023, to February 26, 2024, was necessitated by "the decision to delay an otherwise legitimate and successful third-party records application until the trial date".
- The defence strategy meant it must bear responsibility for the unnecessary delay of 66 days.

[37] On these findings, the trial judge subtracted additional defence delay of 66 days bringing the net delay to 536 days, 11 days below the *Jordan* ceiling. Mr. Zaki's application for a stay was dismissed.

[38] As the judge found in his s. 11(b) decision, two issues converged to result in the trial not concluding on the original date:

> […] Had this trial started at 9:30 a.m. on December 18th, 2023, and had Dr. McConville's notes been in the hands of the defence prior to the trial date, the trial could have been completed on that date.
>
> What caused the trial to not be completed on December 18th, 2023, must be looked at carefully. As I have already acknowledged, the trial starting late on the scheduled date was entirely the Court's doing, and the Court must bear responsibility for the delay caused by that tardiness because it left the trial one hour short of its required time to complete.

[18] There is a proviso on this point—the Crown position on appeal is that this period should be adjusted in the event this Court found an error and conducted a fresh analysis of delay.
[19] The record indicates it took less than 17 minutes as the issue arose at 3:39 p.m. and trial resumed after recess at 3:53 p.m.

> The other factor that prevented the trial from receiving testimony up to the conclusion of the court day on December 18th, 2023, was the need to address the third-party records disclosure and to allow defence the time to review the notes that were disclosed.

[39] It is the trial judge's findings on these points and the resulting attribution of delay that bear scrutiny on this appeal.

[40] I turn now to consider whether the judge erred in his decision.

Did the trial judge err in his decision to dismiss the stay application?

[41] I am persuaded that several errors exist in the trial judge's analysis of delay in this case.

Palpable and Overriding Error

[42] Findings of fact made by a trial judge are owed deference unless they are the outcome of a palpable and overriding error.[20] In this case, the trial judge made findings falling into this category of error and underlying key aspects of his decision. These findings are found in the analysis of delay resulting from the third-party records application.

[43] In attributing delay from the failure to bring a timely application, the trial judge made a number of factual determinations. Among these were: (1) the defence requested an adjournment to review the notes; and (2) accepted the offered continuation date without objection. In his reasons, the trial judge said:

> At about 3:40 in the afternoon, the Crown informed the next witness was Dr. McConville, there then ensued a discussion about notes made by Mr. [*sic*] McConville and relied upon by her when providing a statement to the police. Those notes had not been disclosed to defence. The Crown was not in possession of those notes. The Crown's position was they were third-party records, and defence would have to apply to the Court to receive them.
>
> Dr. McConville was in the courtroom. I learned that she had the notes with her in court. The notes had been made during a counselling session with the complainant, Dr. McConville's client, while Mr. Zaki was attending the session by telephone. The notes were allegedly about utterances made by Mr. Zaki during that phone call.

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[20] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10-14; *R. v. Poperechny*, 2020 MBCA 81 at para. 27 as relied on in *R. v. Kruk*, 2024 SCC 7 at para. 96; and *R. v. Atlantic Road Construction and Paving Limited*, 2025 NSCA 31

> I quickly decided that they were not subject to therapist-client confidentiality. They related to words said to have been spoken by the accused. Defence was entitled to have them. Dr. McConville was instructed to make a copy of her notes with the Crown's assistance and to provide them to the defence. This exchange required seven minutes of court time. The Court recessed to allow this disclosure to occur.
>
> Ten minutes later, court resumed.[21] It was confirmed that defence was in possession of the sought-after notes and **defence, at that time, requested the trial continuation be adjourned to allow review of the notes and for counsel to confer with Mr. Zaki in preparation of Dr. McConville's testimony**. **Mr. Murray suggested that an additional half-day would be required to complete the trial. The date of February 26th, 2024 was offered by the Court. Defence and Crown accepted that date without further discussion.**
>
> [Emphasis added]

[44] The trial judge explained why he concluded the defence should be responsible for the vast majority of the delay after the original trial date:

> The delay from December 22nd, 2023, to February 26th, 2024, because of the decision to delay an otherwise legitimate and successful third-party records application until the trial date, was caused by the defence choosing that strategy, and the defence must bear the responsibility for causing that otherwise unnecessary delay. Those 66 days of delay will be subtracted from the overall delay of 684 days.

[45] In the context of assessing trial delay, findings made about what happened and why are afforded a high degree of deference. However, in this case, when the decision is compared with the record, it is evident: (1) defence counsel did not request an adjournment to review the notes; and (2) defence counsel did not accept the continuation date without objection.

[46] On the first point, the record indicates defence counsel objected to hearing from Dr. McConville without seeing the requested notes and then asked for time to review the notes with his client but made no adjournment request. In both instances, defence counsel was careful to cover his position with recognition the trial was "not going to finish anyway." In view of the record, it was an error for the trial judge to find: (1) the defence requested an adjournment; and (2) the third-party records application "necessitated an adjournment mid-trial to allow defence counsel and Mr. Zaki to review the notes and organize the strategy of cross-examination of Dr. McConville".

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[21] See note 19, the record indicates the records issue took 13 minutes not 17 minutes.

[47] It was the trial judge who raised the need to set a continuation date when it became clear the trial would not finish in the time scheduled. Although Dr. McConville's evidence was expected to be brief and the records issue resulted in production of one page of notes, there was no inquiry made with defence counsel about how much time was being requested to review the notes and discuss them with Mr. Zaki.[22] The trial judge simply adjourned the trial and directed Dr. McConville to return on the next date.

[48] On the second point, the defence did not "accept the [February 26, 2024] date without further discussion". To the contrary, in response to the proposed date, the defence raised the issue of delay, expressed concern, noted the matter was already at month 20, and asked "Is there any time sooner?" Both the clerk and the trial judge confirmed the date offered was "the earliest time we have available."

[49] On these important points, the record leads to a conclusion the trial judge made palpable and overriding errors. In the fresh analysis that follows, no deference will be given to the impugned findings.

Errors of Law

[50] The errors identified above appear driven by the trial judge's failure to consider key principles of the *Jordan* framework at the critical juncture. I would focus on two key aspects (1) the absence of any inquiry to identify the point at which both the court and Crown were ready to proceed, and the defence was not; and (2) the absence of any steps to mitigate delay not caused by defence conduct.

[51] On the first point, the underlying rationale of such an inquiry is to ensure the defence does not benefit from its own "delay causing action or inaction."[23] This aspect of the analysis of defence delay was discussed in *Jordan*:

> [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. **However, periods of time during which the court and the Crown are**

[22] The record indicates the defence received a single photocopied page from Dr. McConville's record in compliance with the trial judge's direction to produce the notes of Mr. Zaki's statements. It further indicates the page was "probably more generous than it needs to be." In other words, the relevant information was something less than a single page.

[23] *Jordan* at para. 113.

> **unavailable will not constitute defence delay, even if defence counsel is also unavailable**. […] [24]
>
> [Emphasis added]

[52] In this case, the trial judge found the defence responsible for most of the delay between trial dates when the record provides no evidentiary basis to determine how much delay flowed solely or directly from defence conduct. There was simply no inquiry about how much time the defence required to review the newly produced notes. This failure to inquire was likely driven by the reality of the situation. The trial required a continuation date notwithstanding the defence's need for "time" to review the notes.

[53] On the second and related issue, the critical failure occurred at the end of the original trial date when no steps were taken, even after the defence highlighted the issue of delay. The following excerpt (repeated here for ease of reference) encapsulates the error:

> **MR. MURRAY:** Thank you, Your Honour, I do have that. There's a whole page of notes that's been provided. It's probably more generous than it needs to be, but I'll keep it private. **I'd like some time to talk with my client about it. As you say, we're not going to finish today.**
>
> **THE COURT:** **Right. We need to find time for a continuation.** Mr. McCarroll, what's your estimation, Mr. Murray, as far as time to complete the evidence?
>
> **MR. MCCARROLL:** **Another ten minutes for Crown's case**, Your Honour.
>
> **THE COURT:** Is Dr. McConville the last witness for the Crown?
>
> **MR. MCCARROLL:** Yes.
>
> **MR. MURRAY:** Oh.
>
> **THE CLERK:** **February 26th, 2024.**
>
> **THE COURT:** Dr. McConville, what's your schedule like?
>
> **A:** Mondays and Fridays are open. I'm not sure what day that falls on.
>
> **THE COURT:** Monday.
>
> **A:** Yeah.
>
> **MR. MCCARROLL:** February 26th is fine with the Crown.
>
> **THE COURT:** **I'm more concerned with Defence counsel.**

[24] See also *Cody* at paras. 28 and 30.

> **MR. MURRAY:** I'm available**. I'm concerned about time because we're...this is month 20. Is there any time sooner?** You can anticipate final submissions, you can anticipate, because of the way I've asked some questions, that Mr. Zaki will be testifying**. I am expecting it's a half day that we need.**
>
> **THE CLERK: Unfortunately not.**
>
> **THE COURT: February 26th, at 9:30 is the earliest time we have available.**
>
> [Emphasis added]

[54] At this point, neither the trial judge, nor the Crown initiated a discussion about the state of delay in the proceeding. Neither responded in any way to the defence raising concern about delay or the declaration that it was then already at 20 months since Mr. Zaki was charged.

[55] The status of the matter called for an inquiry into measures to minimize delay, but none was undertaken. No submissions were invited or offered on the *Jordan* ceiling or possible steps to mitigate further delay. There was no trial management undertaken to clear an earlier half-day of trial time, nor any consideration of breaking the trial time down into shorter segments in order to conclude sooner than February 26, 2024.[25] Had any inquiry been made, the urgency of the situation would have been apparent. As of December 18, 2023, the total delay was 615 days, with no period of defence delay waived or conceded.[26]

[56] The importance of a proactive approach to delay was emphasized in *Cody*:

> [36] To effect real change, it is necessary to do more than engage in a retrospective accounting of delay. It is not enough to pick up the pieces once the delay has transpired" (*Jordan*, at para. 35). A proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility (*Jordan*, at para. 137).
>
> [37] We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture". (*Jordan*, at para. 114). As this Court observed in *Jordan*, the role of the courts in effecting real change involves
>
> > implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases

[25] The trial judge's reasons suggest shorter periods of time would have been available sooner than February 26, 2024.

[26] Had the trial finished on December 18, 2023, the total delay would have been 615. If the defence delay to that point was subtracted, the net delay would have been 533 days, 14 days under the *Jordan* ceiling.

> efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. […]
>
> […]
>
> [38] In addition, trial judges should use their case management powers to minimize delay. […]

[57] The failure to take any steps to mitigate the delay in this case falls below the standard required by both *Jordan* and *Cody*.

[58] Before moving on to a fresh analysis, there is one other important finding requiring review. In his decision, the trial judge found, absent the records issue, the trial "could have been and would have been scheduled before me for a date no later than December 22, 2023". He went on to find only 4 days of delay could be attributed to the late start of the trial on December 18, 2023. However, there is no basis for the judge to make this finding. There is simply no evidence of any trial time available prior to February 26, 2024. To the contrary, after the defence expressed concern and asked whether earlier time was available, the answer was no. Against this record, it was a clear error for the judge to *ex post facto* find that trial time would have been available. Even if such a finding was potentially available, in the absence of any inquiry, there is no evidence about counsel's availability.

The Third-Party Records Issue

[59] The central reason for dismissing Mr. Zaki's stay application was the trial judge's conclusion that 66 days between December 18, 2023 and February 26, 2024 resulted from defence conduct in delaying an otherwise legitimate third-party records application until trial.

[60] When the issue crystallized mid-trial, it resulted in an interruption in the proceedings. The record indicates the trial judge disposed of the issue summarily, finding no basis to invoke the *Code*'s third-party record production regime. However, in his s. 11(b) decision, the trial judge faulted the defence for not bringing a third-party records' application in advance of trial.

[61] On appeal, Mr. Zaki contends he was entitled to disclosure of the notes and if the Crown wished to rely on Dr. McConville's evidence, it had the responsibility to obtain and produce her notes beforehand. Mr. Zaki says the resulting delay belongs to the Crown.

[62] Mr. Zaki's position is predicated on the fact that he sought only notes made of his own statements from a witness who was to testify to his alleged admissions. In asserting the delay belongs to the Crown, Mr. Zaki relies on a line of authority supporting the principle that notes used to refresh a witness's memory must be disclosed to the opposite party so that the witness's reliability and truthfulness can be properly tested.[27] There is no error in the general principle advanced, but it ignores the full context of the issue in this case. The notes Mr. Zaki sought were those made by a psychologist, acting in her professional capacity, during a therapy session with the complainant. The notes were not in the possession of the Crown and the witness refused to produce them.

[63] In his factum, Mr. Zaki acknowledges the production of therapeutic records in a sexual assault prosecution is "generally" governed by ss. 278.1 to 278.94 of the *Code*, provided the records sought contain personal information for which there is a reasonable expectation of privacy. Mr. Zaki argues he was not seeking the kind of records caught by these provisions—there was no request for records containing any of the complainant's personal information. Nor was there any information sought that would intrude on the professional relationship between the complainant and her psychologist.

[64] The Crown maintains its position the obligation to obtain these notes was on the defence. The defence's failure to take the required steps in a timely way, and the ensuing delay, belong to the defence. The Crown cooperated to the extent possible by forwarding the defence request to Dr. McConville and relaying her reply. It took reasonable and timely steps and did not cause or contribute to any delay on this issue.

[65] What happened in this case involved unusual circumstances. The record on appeal does not allow a precise determination about the scope and nature of the records requested by Mr. Zaki prior to trial. We do know Mr. Zaki and his counsel chose to do nothing until the issue arose mid-trial. When the Crown called Dr. McConville to testify they revived their request. At this point, the record is clear—Mr. Zaki only sought notes of any comments he allegedly made in anticipation of a witness testifying to the issue. However, it is also clear the judge was left to contend with a late breaking issue of some complexity interrupting an already time-strained proceeding.

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[27] See e.g. *Cornerstone Co-operative Homes Inc. v. Spilchuk*, [2004] O.J. No. 4049 (ONSC) at para. 16; *R. v. Fast*, 2009 BCSC 1671 at para. 49; *R. v. Sachkiw*, 2014 ONCJ 287 at para. 60; *Cabana v. Newfoundland and Labrador*, 2020 NLCA 44 at para. 68; and *R. v. Slater*, 2014 ONSC 1518.

[66] In *R. v. J.J.*, the Supreme Court of Canada acknowledged the challenge sometimes involved in determining whether a document is a record under s. 278.1, and endorsed a practical approach:

> [103] In light of the uncertainty regarding the scope of records, some defence counsel have on occasion brought a motion for directions before engaging in the procedure under ss. 278.92 to s.278.94, to determine whether the particular evidence comes within the definition of a "record" under s. 278.1. Motions for directions are not explicitly contemplated by the statutory language of the record screening regime: they are a purely a discretionary exercise of the presiding judge's trial management power.
>
> [104] The test we have articulated for interpreting s. 278.1 is designed to assist counsel and judges in reducing the need for motions for directions. However, in cases where the accused does bring a motion for directions, the presiding judge must decide whether the proposed evidence is a "record." Where, in the opinion of the judge, the evidence is clearly a "record," the judge should deal with the matter summarily and order the accused to proceed with a private record application. Equally, where the judge is uncertain whether the proposed evidence is a "record," they should instruct the accused to proceed with an application. **Only if the judge is clearly satisfied that the proposed evidence does not constitute a "record" should they direct that the accused need not bring an application.**[28]
>
> [Emphasis added]

[67] The Crown concedes that Mr. Zaki should have received the notes, or a redacted version of them. In this context, it was open to the judge, in keeping with *J.J.*, to summarily dispose of the issue when it arose mid-trial by finding the notes did not trigger the *Cod*e's third-party records' regime. The judge's trial management power left him with considerable discretion to hear and dispose of the issue. I would not endorse aspects of the process employed by the trial judge in these unique circumstances. In my view, more care was required when ordering production of notes extracted from a counselling record. The process used by the trial judge resulted in production of "something more generous than it needs to be".[29] Although this is a significant error, it is immaterial to the analysis of delay in this case.

[68] However, the Crown's concession on the material point is appropriate—there was no error in ordering production of the notes made of what was said by Mr. Zaki.

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[28] 2022 SCC 28 [*J.J.*].

[29] This is how the defence characterized what they received pursuant to the trial judge's direction to produce the notes made of Mr. Zaki's statements.

A fresh Analysis of Delay

[69] The errors made by the trial judge require a fresh analysis of the delay in this case. On this assessment, deference is owed to the findings made by the trial judge that are free from error.

[70] There is no dispute that the total delay in this case was 22.5 months. On the hearing of Mr. Zaki's application, the dispute was about two periods in the proceeding and whether these periods were deductible as defence delay: (1) a period of 138 days between June 16 and November 1, 2022; and (2) a period of 70 days between December 18, 2023, and February 26, 2024.

[71] In the first period, the trial judge's findings of fact were not challenged, and deference is owed to them on review. The record indicates that Mr. Zaki and his first lawyer awaited disclosure from the Crown until the week before an appearance on July 15, 2022. Defence counsel appeared and waived delay on the July 15 appearance. On his application, Mr. Zaki disputed the waiver and testified he had not provided counsel with instructions to waive delay. The trial judge accepted this evidence. However, he attributed 82 days of delay to the defence between July 15 and October 5, 2022, as Mr. Zaki was not available to review disclosure or instruct counsel in that period. Mr. Zaki testified he was out of the province in basic military training and unavailable to attend court appearances.

[72] On appeal, Mr. Zaki does not dispute the finding or the resulting attribution of 82 days of defence delay. The Crown argues 109 days should be defence delay on the basis that Mr. Zaki could have instructed counsel by June 16, 2022, if he was being diligent. This is the same argument made to the trial judge. In response, the defence argued there was no Crown evidence as to the exact date of disclosure to Mr. Zaki's counsel and no basis to attribute any delay to Mr. Zaki beforehand.

[73] The trial judge considered and accepted the evidence of Mr. Zaki's first lawyer that "he had received disclosure from the Crown in advance of that hearing but had not reviewed it with Mr. Zaki." Although no specific finding was made by the trial judge, Mr. Zaki testified that he was advised disclosure was available in July of 2022. The evidence of his first lawyer was that disclosure was received "the week before" the July 15 appearance. The trial judge attributed delay to Mr. Zaki beginning July 15, 2022, on the basis Mr. Zaki was unavailable to review disclosure or instruct counsel. I see no error in the trial judge's findings of fact or attribution, and I would likewise allocate 82 days of delay to the defence in this period.

[74] Moving on in the analysis, I would pause to observe that when the trial date was scheduled on November 1, 2022, it was assigned a date that exceeded 20 months from the date Mr. Zaki was charged. For this reason alone, the issue of delay should have been at the forefront.

[75] The second period of potential defence delay is 70 days between December 18, 2023 and February 26, 2024. The starting point for the analysis of this period is the late start to Mr. Zaki's trial. The 1-hour delay to the trial made the requirement for more trial time inevitable. It removed any possibility the trial would finish as scheduled on December 18, 2023. It appears this fact was evident by the time the records issue arose. No one contested the fact that by 3:40 p.m. the trial was not going to finish that day in any event.

[76] The trial judge correctly found any delay resulting from the late start was not defence delay. By the time the records issue arose, the only Crown witness left was Dr. McConville. Her evidence was expected to take 10 minutes. In the end it took slightly more. Mr. Zaki's evidence eventually took just under 1.5 hours and final submissions just under 20 minutes. After resolving the records issue, the trial was adjourned to "the earliest time we have available." The date of February 26, 2024, was offered as the earliest option after the Crown said its last witness would only take 10 minutes and before defence counsel indicated a half-day was required. I infer from the exchange that the amount of time needed did not alter the availability of the court. I conclude there is no basis to find an earlier date would have been available in the absence of the records issue, nor is there any basis to say defence conduct alone was the reason for the delay in this period. The trial judge did not utilize any of his trial management powers to respond to the circumstances.

[77] I find no basis to allocate any delay to Mr. Zaki between December 18, 2023 and February 26, 2024. The result is total delay of 684 days, less defence delay of 82 days, for net delay of 602 days. The net delay exceeds the *Jordan* presumptive ceiling and there are no exceptional circumstances[30]. In my observation, at the very moment when action was required, complacency set in, and the outcome was inevitable. Mr. Zaki's right to trial in a reasonable time was breached and he is entitled to a remedy. I would grant a stay of proceedings.

[30] The Crown did not argue before the trial judge that exceptional circumstances existed, nor did it challenge the trial judge'

Disposition

[78] I would allow the appeal, quash the conviction, and enter a stay of proceedings.

[79] Given the outcome of the appeal, there is no need to address the Crown cross-appeal on sentence, nor Mr. Zaki's fresh evidence motion.

Gogan, J.A.

Concurred in:

Wood, C.J.N.S.
Van den Eynden, J.A.