NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. S.J.A.*, 2026 NSCA 28

Date: 20260401
Docket: CAC 535008
Registry: Halifax

Between:

S.J.A.

Appellant

v.

His Majesty the King

Respondent

Judges:	Farrar, Bourgeois, Derrick, JJ.A.
Appeal Heard:	February 18-19, 2026, in Halifax, Nova Scotia
Facts:	The appellant was prosecuted for sexual offences against his step-daughter, who was under the age of sixteen. He was found guilty of sexual interference, invitation to sexual touching, and sexual assault. The sexual assault conviction was stayed due to the prohibition against multiple convictions for the same criminal conduct (paras 5-6).
Procedural History:	• Provincial Court, September 6, 2023: The appellant was found guilty of sexual interference, invitation to sexual touching, and sexual assault. The sexual assault conviction was stayed (para 5). • Provincial Court, June 6, 2024: The appellant was sentenced to two years' incarceration (para 6).
Parties' Submissions:	• Appellant: Argued that the trial judge misapprehended key evidence, leading to a miscarriage of justice. Claimed ineffective

assistance of trial counsel and inappropriate remarks by the trial judge post-conviction. Sought a stay of proceedings due to cumulative miscarriages of justice and other factors (paras 2, 12, 20-22).

- Respondent: Acknowledged the misapprehension of evidence but argued that a stay of proceedings was not warranted. Suggested a new trial as the appropriate remedy to address the misapprehension and other claims (paras 3, 23).

Legal Issues:

- Whether the cumulative effect of the material misapprehension of evidence, alleged ineffective assistance of counsel and the trial judge's post-conviction remarks warrant the proceedings against the appellant being stayed.

Disposition:

- Fresh evidence was admitted, the appellant's convictions were set aside on the basis of the trial judge's material misapprehension of evidence, and a new trial was ordered.

Reasons:

Per Derrick, J.A. (Farrar and Bourgeois JJ.A. concurring):

The Court found that the trial judge's material misapprehension of evidence led to a miscarriage of justice, warranting a new trial. The appellant's claims of ineffective assistance of counsel and the trial judge's injudicious remarks did not justify a stay of proceedings. The Court emphasized that a stay is an extraordinary remedy reserved for the clearest of cases, a standard that was not met here. The court found the integrity of the judicial system is better served in this case by not staying the proceedings (paras 34-47).

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

Judges:	Farrar, Bourgeois, Derrick, JJ.A.
Appeal Heard:	February 18-19, 2026, in Halifax, Nova Scotia
Held:	Fresh evidence admitted and appeal allowed, per reasons for judgment of Derrick, J.A.; Farrar and Bourgeois, JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Erica Koresawa, 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.

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] The focus of this appeal is not whether it should be allowed: there is consensus material evidence was misapprehended causing a miscarriage of justice that requires the setting aside of the appellant's convictions for sexual offences. The contentious issue between the parties is remedy. The appellant says only a stay of proceedings can rectify what he characterizes as a constellation of miscarriages of justice. The respondent submits a stay would not be appropriate and says the Court should simply order a new trial.

[2] The appellant and respondent agree to this extent: in finding the appellant not credible, the trial judge, Judge Alain Bégin of the Provincial Court of Nova Scotia, misapprehended key aspects of his testimony. The appellant says we should be satisfied this was compounded by other miscarriages of justice that include his claim that trial counsel was ineffective and post-conviction remarks made by the trial judge. In addition, in support of a stay the appellant points to the amount of time the matter has been taking. The appellant says it is the cumulative effect of these factors that makes a stay of proceedings the only appropriate remedy.

[3] The respondent says the stringent requirements for entering a stay of proceedings have not been met in this case. The only basis for appellate intervention is the misapprehension of evidence. As for the appellant's other claims, the respondent rejects his characterization of them as miscarriages of justice. The respondent says the appeal should be resolved by ordering a new trial—the standard remedy for a misapprehension of evidence—which will also remedy the appellant's complaints about trial counsel's performance and the judge's remarks.

[4] I would order a new trial. The ultimate remedy of a stay of proceedings is not warranted.

The Factual Context for the Grounds of Appeal

[5] The appellant was prosecuted for sexual offences against his step-daughter when she was under the age of sixteen. At the conclusion of a trial in which the complainant and the appellant testified, he was found guilty of sexual interference contrary to s. 151 of the *Criminal Code*, invitation to sexual touching contrary to s. 152 of the *Criminal Code*, and sexual assault contrary to s. 271 of the *Criminal*

Code.[1] At sentencing, the sexual assault conviction was stayed pursuant to *R. v. Kienapple*[2] and the prohibition against multiple convictions for the same criminal offending.

[6] On June 6, 2024, the appellant was sentenced to two years' incarceration.

Misapprehension of Evidence

[7] There is a stringent standard for granting a new trial on the grounds of a misapprehension of evidence. A miscarriage of justice is only made out where the misapprehension could have affected the outcome of the trial.[3] That exacting standard has been satisfied here. The trial judge's assessment of the appellant's credibility turned on a misapprehension of his evidence.

[8] In his testimony the appellant flatly denied the complainant's allegations. The trial judge delivered his oral decision on September 6, 2023, about six weeks after the trial ended. He concluded he did not believe the appellant. He said the appellant had "presented unreliable and not credible evidence and that brought all of his evidence into question". He cited three aspects of the evidence that led him to reject the appellant's denial.

[9] The trial judge found the appellant had tried to refute the complainant's allegations by indicating she had travelled alone with him in his car. However neither the appellant nor his counsel had stated this.

[10] The trial judge misapprehended the appellant's evidence about why he left a residence in October 2020 when the complainant unexpectedly arrived there. The judge made the incorrect finding the appellant had claimed he left because of the complainant's allegations against him, allegations the complainant did not take to police until November 2020. However, the appellant testified he left when the complainant arrived because he had heard people say she might want to get him into trouble. Contrary to the trial judge's finding, the appellant's explanation for why he left the residence was not misaligned with the chronology of events.

[11] The trial judge also erroneously found the appellant gave inconsistent evidence, that he claimed to have heard rumours prior to October 6, 2020 about the complainant making allegations but then acknowledged he and the complainant were "conversing and on good terms" at this time. In fact, the appellant testified to

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[1] Unreported oral decision of September 6, 2023.
[2] [1975] 1 S.C.R. 729.
[3] *R. v. Smith*, 2021 SCC 16 at para. 2.

having been on good terms with the complainant's mother, his former intimate partner, on October 6, 2020. The trial judge misremembered the evidence, transposing the complainant for the mother and relying on this as another reason to disbelieve the appellant.

Ineffective Assistance of Counsel

[12] The appellant's claim his trial counsel was ineffective has been advanced through fresh evidence in the form of affidavits and cross-examination. We have accepted the evidence provisionally for the purpose of addressing this ground of appeal. Drawing from the cross-examination of trial counsel at the appeal, the appellant submits the ineffective assistance was manifested by trial counsel:

- failing to adequately prepare for and conduct the preliminary inquiry;
- failing to obtain informed instructions on election and re-election;
- failing to obtain the appellant's instructions before agreeing, after the preliminary inquiry, to Judge Bégin also conducting the trial;
- failing to adequately prepare for and conduct the cross-examination of the complainant;
- improperly relying on stereotypical reasoning to inform cross-examination of the complainant, trial strategy and closing submission;
- failing to adequately prepare the appellant for his direct and cross-examination; and
- lacking current competence to defend sexual offence charges, a substantively and strategically complex area of criminal law.

[13] The appellant cites deficiencies in trial counsel's professional practices as underscoring the ineffective assistance he received. These included: minimal billing of 5.5 hours for preparation on a Legal Aid certificate that pre-authorized 20 hours, the failure to send correspondence such as a retainer letter, letters confirming court dates, and opinion and advice letters, and the likelihood, as confirmed by trial counsel's responses in cross-examination, that he made little or no notes to the file, including in relation to client instructions.

[14] The appellant testified on the fresh evidence motion that he was unsure of the trial process, including the order in which witnesses would testify. He thought trial counsel would deny the allegations on his behalf. He said trial counsel did not prepare him for testifying although he understood it was important to tell the truth.

The Trial Judge's Remarks Two Days After Convicting the Appellant

[15] When convicting the appellant on September 6, 2023, the trial judge, noticing he was visibly upset and crying, said: "I know you're displeased with my decision, clearly".

[16] On September 8, 2023, the trial judge conducted the sentencing hearing of a young person in the Youth Justice Court. The young person's sentencing had nothing to do with the appellant's case. It was a sentencing for public mischief, an offence under s. 140(1) of the *Criminal Code*. The young person had pled guilty, admitting they falsely accused three other young persons of sexual assault. As the sentencing hearing got underway, the trial judge, noting that no victim impact statements had been filed, addressed the victims and their parents. He said he appreciated the damage to the reputations of the young victims and that he fully understood what they had endured. He continued:

> Sexual assault trials are the most difficult thing I do. And I do far too many of them. I do a lot of them. And the danger of a sexual assault trial is a convincing liar as a victim, all right? My biggest fear as a judge is wrongfully convict - convicting someone. It's a danger every single time I do a sexual assault trial. And I rendered a decision yesterday or the day before, and the reaction of the accused, I almost thought, did I get it wrong? I, I found him guilty and it was a, it was a child testifying against the stepfather. It, it's a huge - just a sec - it's a huge fear -

[17] At this point a man in the public gallery interrupted and admonished the judge not to "talk about that". He indicated the judge was referring to a relative and that what was being said "hit home, right?' After a brief exchange with the man, the trial judge resumed his remarks:

> Yeah. Those are, those are dangerous – they're risky. I mean, at the end of the day, I, I, I believe what I did, but, you know, it's – those are dangerous things, all right? And a wrongful conviction for a sexual assault is very damning even as a youth, all right? So we got to be very careful what we say and what we do, 'cause there's consequences, all right?

[18] The trial judge concluded this speech by noting the young person he was about to sentence was nodding their head "in acknowledgement". He said: "That's good" and indicated his purpose had been to send a message to them: "There was no healing circle for [the young person] involved, so I just want [the young person] to be able to hear it".

[19] The respondent does not dispute the trial judge was referring to the appellant's conviction in his remarks. The fresh evidence confirms the outspoken man in the Youth Court gallery is related to the appellant.

Delay and Other Factors

[20] In support of a stay of proceedings, the appellant also advances delay and other factors. He says he was convicted by a judge who had heard both the preliminary inquiry and trial without trial counsel having consulted with him before agreeing to the judge conducting both proceedings. (The appellant was not present in court to hear trial counsel say "I don't care" when asked by Judge Bégin if there was any issue with him hearing the trial.) The appellant complains the judge "bantered" with the complainant as she settled into the witness box for further cross-examination after the trial was adjourned to address a legal issue. (The judge made brief, frivolous comments to the eighteen-year old complainant which he concluded by saying: "I'm just teasing you; you're all right. Okay, don't be nervous".)

[21] The appellant claims a new trial cannot remedy the prejudice he faces if the prosecution against him is allowed to proceed. He says:

- At a new trial he will be subject to cross-examination on the evidence he gave at the trial before Judge Bégin which was elicited without the effective assistance of counsel. In the appellant's submission this advantages the Crown and disadvantages him.
- A new trial will proceed without him having the benefit of a meaningful preliminary inquiry.
- The delay in the proceedings will continue. The charges were laid in February 2022. The appellant was convicted in September 2023 and sentenced in June 2024 to two years' imprisonment in a federal penitentiary. When released on February 20, 2025 under a bail order pending his appeal the appellant had served eight and a half months of his sentence.

[22] The appellant says the constellation of issues he has raised—the misapprehension of evidence, the ineffective assistance of counsel, the trial judge's remarks, and the ongoing prejudice caused by delay and other factors amount to abuse of process and can only be remedied by the proceedings being stayed. He says both abuse of process categories, the main category that focuses on the right to a fair trial and the residual category focused on the integrity of the administration of justice, apply in his case.

[23] I turn now to the legal principles that govern what has been described as the "ultimate remedy".[4]

Legal Principles – A Stay of Proceeding

[24] Section 686(8) of the *Criminal Code* endows this Court with the authority to order a stay of proceedings where an appeal from conviction is allowed. The section confers what are sometimes called "residual" or "ancillary" powers which allow an appellate court to make any order, in addition to quashing the conviction, "that justice requires".[5]

[25] The Supreme Court of Canada, commenting in *Bouvette* on the option of an appellate court entering a judicial stay, has referred to its extraordinary character:

> [57] […] A judicial stay brings a definitive end to the proceedings -- a "drastic" remedy (*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 30). It is only to be granted to prevent an abuse of process in the "**clearest of cases**", addressing prejudice to the accused's right to a fair trial or to the integrity of the justice system (para. 31, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). (*emphasis in original*)

[26] The "clearest of cases" threshold for ordering a stay of proceedings recognizes the finality of the remedy:

> [53] […] Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact.[6]

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[4] *R. v. Tobiass*. [1997] 3 S.C.R. 391 at para. 86 (QL version) [*Tobiass*].
[5] *R. v. Bouvette*, 2025 SCC 18 [*Bouvette*].
[6] *R. v. Regan*, 2002 SCC 12 at para. 53 [*Regan*].

[27] The three-step process set out in *R. v. Babos*[7] governs the determination of whether to order a stay of proceedings. The test applies whether the stay is sought under either of the abuse of process categories: the main category where an accused's fair trial rights have been impacted, and the residual category which is concerned with state conduct that poses no threat to trial fairness but risks undermining the integrity of the judicial system.

[28] For either category, the requirements are the same:

(1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome".[8]

(2) There must be no alternative remedy capable of redressing the prejudice.[9]

(3) Where uncertainty remains after steps (1) and (2) over whether a stay is warranted, the court must undertake a balancing of the interests in favour of granting a stay, such as denouncing the conduct and preserving the integrity of the justice system against the societal interest in a determination of the case on the merits.[10]

[29] In residual category cases, the balancing exercise must always be undertaken with consideration of factors such as: the nature and seriousness of the misconduct, whether it is isolated or systemic, the accused's circumstances, the charges, and the interests of society in the disposition of the charges on the merits. *Babos* held:

> […] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process.[11]

[30] A stay of proceedings is "a prospective rather than a retroactive remedy". Its aim is to "the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future".[12] In very rare cases will the

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[7] 2014 SCC 16 [*Babos*]. The three-part test was most recently reiterated by the Supreme Court of Canada in *R. v. Brunelle*, 2024 SCC 3 at para. 29.
[8] *Regan* at para. 54; *Babos* at para. 32.
[9] *Regan* at para. 54; *Babos* at para. 32.
[10] *Regan* at para. 57; *Babos* at para. 32.
[11] *Babos,* at para. 41.
[12] *Regan* at para. 54.

wrong done to the accused be "so egregious that the mere fact of going forward in light of it will be offensive".[13]

[31] State misconduct, in the nature of police or prosecutorial misconduct that usually undergirds applications for stays of proceedings, is not an issue here. As the Supreme Court of Canada established in *R. v. Keyowski*, proof of state misconduct is not a prerequisite to obtaining a stay. Under *Keyowski* a stay is warranted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the continuation of proceedings would be "oppressive or vexatious".[14] In *Keyowski* the issue was whether a stay of proceedings should be entered to spare the accused a third trial. The Court concluded that subjecting Mr. Keyowski to a third trial might "stretch the limits of the community's sense of fair play but does not itself exceed them". The seriousness of the charges (criminal negligence causing death) was a significant factor in the determination that "the administration of justice is best served by allowing the Crown to proceed with the new trial".[15]

[32] The prejudice component for a stay in the residual category for abuse of process is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice". This is reflected in the majority decision of the Supreme Court of Canada in *R. v. Conway*:

> [8] Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, supra, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal

[13] *Tobiass* at para. 91.
[14] *R. v. Keyowski*, [1988] 1 S.C.R. 657 at para. 2 (QL version) [*Keyowski*].
[15] *Keyowski* at para. 4.

> interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.[16]

[33] Throughout the Supreme Court jurisprudence on abuse of process the standard for the remedy of a stay has remained unchanged: a stay of proceedings is only available in "the clearest of cases".[17]

Analyzing the Cumulative Effect - Not One of the Clearest of Cases

[34] The appellant invokes both the main and the residual categories in seeking a stay. He says the prejudice to his fair trial rights will be perpetuated at a new trial because of the ineffective assistance of trial counsel. He says the conduct of the trial judge has harmed the integrity of the justice system. He urges us to accept there has been a cumulative impact on the integrity of the judicial system which warrants the proceedings being stayed. I am not persuaded.

[35] Considering trial conduct and circumstances cumulatively may be required where there is balancing of "several instances of misconduct against the societal interest in a trial".[18] A cumulative analysis may lead to the ordering of a stay where each individual incident by itself would not. This is not such a case. Misapprehensions of evidence and the allegation of ineffective assistance of counsel which implicate trial fairness are addressed by ordering a new trial. The judge conducting the new trial will have the benefit of this Court's reasons and will avoid the mistakes and indiscretions of the first trial. In any re-trial the Crown will be aware of the original defence strategy.[19] The appellant will have new counsel and the Crown will be obliged to prove guilt beyond a reasonable doubt in the event the prosecution proceeds. The prejudice the appellant experienced as a result of the misapprehension of his evidence will not be "manifested, perpetuated or aggravated through the conduct of a new trial".[20]

[36] It is unnecessary to determine if trial counsel's representation, which the fresh evidence suggests was lacklustre, amounted to ineffective assistance. A claim of ineffective assistance must ultimately establish prejudice in the form of a miscarriage of justice. A miscarriage of justice may result where ineffective

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[16] [1989] 1 S.C.R. 1659 at para. 8 (Q.L. version) [*Conway*]. In *R. v. Jewitt*, [1985] 2 S.C.R. 128 the Supreme Court affirmed a trial judge's discretion to stay proceedings "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings".
[17] *Brunelle* at para. 29, citing *Tobiass* and *R. v. O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*].
[18] *Babos* at para. 73.
[19] *Varennes* at para. 111.
[20] *Regan* at para. 54.

assistance of counsel has rendered the verdict unreliable and/or the trial unfair. The miscarriage of justice in this case arises from the trial judge's material misapprehension of the evidence. That is what rendered the verdict unreliable and prejudiced the appellant.

[37] Establishing a miscarriage of justice as a result of ineffective assistance of counsel is, in any event, a high hurdle to clear.[21] There is a strong presumption that counsel's performance "fell within the wide range of reasonable professional assistance".[22] Even had it been determined that trial counsel provided ineffective assistance, the appropriate remedy would have been a new trial.

[38] While the ineffective assistance of counsel could be the basis for a stay of proceedings rooted in the common law doctrine of abuse of process,[23] it has not been established here that the acts or omissions of trial counsel will render a new trial, presumably with new trial counsel, unfair. To borrow the metaphor used by Justice Binnie in *R. v. Neil*, the appellant has not shown "that the purity of the waters of the fountain of justice [has been] irredeemably polluted"[24] by what his trial counsel did or did not do.

[39] What has been established is that the appellant's conviction, based as it was on a misapprehension of the evidence, is unsafe. The misapprehension of evidence caused a miscarriage of justice. This finding displaces the issue of trial counsel's representation. What trial counsel may have failed to do is immaterial: the prejudice to the appellant was the trial judge's rejection of his credibility on the basis of misapprehended evidence. This led directly to his conviction.

[40] None of the other circumstances—delay and the time the appellant has served in prison already, and the trial judge's "teasing" of the complainant, while ill-advised,—can be said to offend society's sense of fair play and decency so as to compromise the integrity of the justice system. The appellant has not shown how the delay associated with a retrial prejudices him. The constitutional clock for trial delay is "reset to zero when a new trial is ordered".[25] Even so, there will be circumstances where first-trial delay can be considered in assessing the reasonableness of retrial delay.[26] The Supreme Court has directed that: "[…]

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[21] *R. v. Kahsai*, 2023 SCC 20 at para. 68 [*Kahsai*].
[22] *G.D.B*. at para. 27.
[23] *R. v. Neil*, 2002 SCC 70 at para 43 [*Neil*], cited in *R. v. Shilmar*, 2017 ABPC 213 at para. 112.
[24] *Neil* at para. 42. Justice Binnie said he was borrowing a metaphor "from Lord Brougham's era" of the mid-19th century.
[25] *R. v. J.F.*, 2022 SCC 17 at para. 73 [*J.F.*].
[26] *J.F.* at para. 73.

everyone, and especially the Crown, must ensure that retrials are prioritized when trial dates are set and that retrial delay is a short as possible".[27]

[41] The appellant has not shown how being tried again subjects him to unique disadvantage. The appellant has not shown prejudice will be caused by further delay. The fact that he has served a portion of his two year penitentiary sentence is also not determinative.[28]

[42] The final issue is the trial judge's remarks on September 8, 2023, two days after he convicted the appellant. Although the appellant characterized the judge's comments as creating a reasonable apprehension of bias, he acknowledged at the appeal the remarks do not fit neatly into that paradigm. The appellant agreed the remarks, made post-conviction, could not be construed as the judge having predetermined his guilt. He argues they fall under the residual category of abuse of process and constitute a miscarriage of justice. He says the judicial conduct in this case is comparable to what the trial judge did in *R. v. KJMJ*[29] and *R. v. Nevin*[30].

[43] I do not agree the trial judge's remarks created either a reasonable apprehension of bias or amounted to a miscarriage of justice. I would however strongly condemn them. They were inappropriate, injudicious and improper. They should not have been made. It should have been immediately apparent to the judge when he was interrupted that his "message" to the young person he was sentencing had gone out of bounds. Despite being cautioned he was undeterred and pressed on.

[44] The remarks represent another instance of this trial judge showing a lack of judicial restraint and judgment. However they are not comparable to the judicial conduct addressed in *R. v. Nevin*, a decision of this Court allowing Mr. Nevin's appeal and ordering a stay of proceedings. In *Nevin*, this Court found Judge Bégin's conduct alone was egregious enough to justify a stay, but nevertheless took other factors into account.[31]

[45] This case is not *Nevin*. In *Nevin* the trial judge's conduct was truly extraordinary. This Court described it as "inexplicable and unprecedented", stating that if the judicial conduct in the case was not an affront to the administration of justice, "it is hard to imagine a case that would be". The Court found the trial

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[27] *J.F.* at para. 72.
[28] *R. v. Varennes*, 2025 SCC 22 at paras. 111-114 [*Varennes*].
[29] 2023 NSCA 84 [*KJMJ*].
[30] 2024 NSCA 64 [*Nevin*].
[31] *Nevin* at para. 125.

judge's conduct "so offensive to societal norms of fair play that to continue with the proceeding would be harmful to the integrity of the judicial system". This finding took the alternative remedy of a new trial off the table. As the Court said: "The granting of a new trial would not adequately disassociate the justice system from the conduct of this proceeding".[32]

[46] The case before us is not as comprehensively about judicial conduct as *Nevin*. The trial judge's remarks in this case do not give rise to a reasonable apprehension of bias as did his "startling language and behaviour" in *KJMJ*.[33] While it is necessary to denounce the trial judge's remarks in Youth Court about the appellant's conviction, they do not justify staying the prosecution of serious charges alleging sexual offences against a child. In *Nevin* the "extent of the unfairness of the process the trial judge undertook" made a stay the only suitable remedy. It truly was one of the "clearest of cases". The same cannot be said here.

Conclusion

[47] This is not a case where there has been prejudice to an accused's rights or to the administration of justice that "is irreparable and cannot be remedied".[34] A stay of proceedings can only be ordered where the court has found there was no alternative remedy capable of redressing the prejudice, which in this case was the unreliable verdict. To ignore this step in the stay analysis is an error of law.[35] The alternative remedy here is a new trial. The integrity of the judicial system is better served in this case by not staying the proceedings.

Disposition

[48] I would admit the fresh evidence, set aside the appellant's convictions and order a new trial.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.

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[32] *Nevin* at para. 120.
[33] *KJMJ* at para. 14.
[34] *R. v. Sullivan*, 2022 SCC 19 at para. 95.
[35] *Regan* at para. 121.