**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Sullivan*, 2024 NSCA 5

**Date:** 20240109
**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***

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| **Judge:** | Derrick, J.A. |
| **Motion Heard:** | January 4, 2024 in Halifax, Nova Scotia in Chambers |
| **Written Decision:** | January 9, 2024 |
| **Held:** | Motion for bail pending appeal dismissed |
| **Counsel:** | John Sullivan in person<br>Timothy O'Leary, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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.

**Decision:**

*Introduction*

[1] John Sullivan has appealed convictions for: being unlawfully in the dwelling house of his former intimate partner S.R., and committing the indictable offence of voyeurism, contrary to s. 349(1) of the *Criminal Code*; breaking and entering S.R.'s home to commit the indictable offence of obstruction, contrary to s. 348(1)(b) of the *Criminal Code*; wilfully attempting to obstruct the course of justice by removing evidence, contrary to s. 139(2) of the *Criminal Code*; and surreptitiously observing S.R. in circumstances in which she could reasonably be expected to be nude, contrary to s. 162(1)(a) of the *Criminal Code*.

[2] He has also appealed his penitentiary sentence of three years.

[3] The trial judge found beyond a reasonable doubt that, between April 19 and May 14, 2019, some six months after their intimate relationship ended, Mr. Sullivan had slipped into S.R.'s home while she and her two children were out, and installed three small cameras. At least two of the cameras were capable of running off S.R.'s WiFi connection. When he became aware on May 14 via remote viewing that S.R. had discovered two cameras, he re-entered the home to remove them. This was shortly after S.R. discovered the cameras and had gone to speak to police.

[4] An SD card seized by police on Mr. Sullivan's arrest later that evening contained footage from a camera mounted in the ceiling of S.R.'s home that she had not located in the course of her initial search. The images included S.R. before dawn on May 14, 2019 without any clothes on.

[5] On July 14, 2021 the trial judge gave a lengthy oral ruling on *Charter* motions brought by Mr. Sullivan. In the *voir dire*, Mr. Sullivan claimed a number of *Charter* breaches. They included breaches related to the seizure by police of the SD card at the time of his arrest. Mr. Sullivan sought to have the SD excluded from evidence. The judge found s. 8 *Charter* breaches and undertook a s. 24(2) *Charter* analysis to determine whether to exclude the SD card. She determined the card should be admitted.

[6] The judge delivered her *Charter voir dire* decision orally. She said:

> The reliability of the evidence and its importance to the Crown's case are very significant considerations. The evidence on the SD card is highly reliable. The

> nature of the evidence cannot be said to operate unfairly vis-à-vis the truth-seeking function of the trial. It is critical evidence, virtually conclusive of guilt on the offences charged.

[7] Mr. Sullivan had been charged on May 14, 2019. The trial proper commenced on August 10, 2021 and concluded with closing submissions on June 27, 2022. Mr. Sullivan made an application pursuant to s. 11(b) of the *Charter* for a stay of proceedings on the basis of unreasonable delay. On November 7, 2022, the judge rendered a lengthy oral decision dismissing the application.

[8] The judge convicted Mr. Sullivan on November 15, 2023 and on November 30, 2023 he was sentenced to a total of three years in prison.

[9] Mr. Sullivan's appeal from his convictions and sentence is scheduled to be heard on June 12, 2024.

[10] Mr. Sullivan has applied pursuant to s. 679 of the *Criminal Code* for bail pending appeal. The Crown opposes his release. After the hearing in Chambers on January 4, 2024, I reserved my decision with reasons to follow. As the following reasons explain, I have concluded that bail should be denied.

*The Grounds of Appeal*

[11] Mr. Sullivan says the trial judge erred on the following grounds:

1) In finding he was not arbitrarily detained and admitting evidence obtained as a result of his unwarranted, arbitrary arrest, a violation of his s. 9 *Charter* rights.

2) In her analysis of s. 24(2) of the *Charter* and admitting the evidence from the SD card, despite finding multiple, cumulative violations of his s. 8 *Charter* rights.

3) In her analysis of facial and subfacial validity of the ITO (Information to Obtain) used to obtain a search warrant for the SD card, and failing to exercise residual discretion to set aside the warrant.

4) In her analysis of exceptional circumstances, and in dismissing his application for stay of proceedings based on delay pursuant to s. 11(b) of the *Charter*.

5) In imposing a demonstrably unfit sentence.

*The Proposed Release Plan*

[12] Mr. Sullivan's bail plan includes his sister as surety. As the bail hearing unfolded, Mr. Sullivan put forward a tightened version of his original plan. In addition to the standard conditions, Mr. Sullivan proposed the following for his release:

- A promise by him and his surety to each pledge $10,000 to the Court to be forfeited if he fails to comply with a condition of his release. (The pledge would be in the form of personal or real property to justify.)

- To reside at his apartment in Halifax where he lives on his own. (Mr. Sullivan indicated that while it is not his preference, he could move in with his sister and her husband if the Court required it.)

- To have no direct or indirect contact with S.R. or her two children.

- To not be within 100 meters of S.R.'s residence or place of employment and not to be within 25 meters of a specific recreational centre on Tuesday nights between 7 p.m. and midnight.

- To not possess any firearm or weapons.

- A curfew of 11 p.m. to 7 a.m. seven days a week with exceptions for medical emergencies, and travel to Bathurst, New Brunswick on 24 hours' notice to the Halifax Regional Police with dates of travel.

- Proof of compliance on curfew checks.

[13] Mr. Sullivan explained in his affidavit that he regularly travels to Bathurst to help his elderly parents with appointments, home repairs and routine household maintenance. As his sister indicated in her affidavit, her seasonal employment occurs in the winter months and she is not able to provide this level of support to their parents.

[14] In response to my questions, Mr. Sullivan indicated he would live with his parents during the Bathurst visits and was prepared to report to police both in

Halifax and while in Bathurst. He also advised it was possible he could move to Bathurst and live with his parents but he was not putting that arrangement forward as his proposed bail plan at this time.

[15] The Crown was content to proceed without the need to cross-examine either Mr. Sullivan or his surety. Mr. O'Leary said the Crown saw no basis for viewing Mr. Sullivan's sister as an unsuitable surety. Other than the fact that she does not live near or with Mr. Sullivan, I agree. She said in her affidavit that her brother's apartment is between her home and her workplace enabling her to check in on him on a regular basis.

[16] Mr. Sullivan's sister indicated in her affidavit that she is well aware of her brother's convictions and the release conditions he was on while his charges were before the court below. She understands the role of a surety and said she would "make every effort to ensure he abides by his release conditions and attends Court as required". In answer to questions by me, she stated she understands the obligation to notify police if Mr. Sullivan was released on bail and violated a release condition. She said she would contact the police in those circumstances. I was satisfied with her responses.

[17] Mr. Sullivan is self-employed, managing monthly and long-term property rentals on contract. There can be urgent tenant calls to be attended to at all hours. He has been relying on his sister to deal with them. If he was released, she would continue in this role during his curfew hours.

[18] Mr. Sullivan notes he was released on March 15, 2019 on a Recognizance with no sureties or deposit. He complied with the release conditions without incident throughout the duration of the proceedings in the court below (to November 30, 2023 when he was sentenced) and attended all court appearances without fail. He has no criminal convictions other than those under appeal.

*Analysis*

[19] Bail on appeal is materially different from bail pre-trial (known as judicial interim release). The appellant no longer enjoys the presumption of innocence that applied at the time of his trial. The entitlement to reasonable bail pre-trial guaranteed by s. 11(e) of the *Canadian Charter of Rights and Freedoms* does not apply in the context of a motion for bail pending appeal. Mr. Sullivan came before

me bearing the burden of establishing, on a balance of probabilities, that he met each of the criteria under s. 679(3) of the *Criminal Code*.[1]

[20] Section 679(3) sets out the three statutory criteria:

> In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
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> (a) the appeal ... is not frivolous;
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> (b) he will surrender himself into custody in accordance with the terms of the order; and
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> (c) his detention is not necessary in the public interest.

(a) Not Frivolous

[21] The Crown does not rest its opposition to Mr. Sullivan's release on the basis that his grounds of appeal are frivolous. The "not frivolous" criterion is not onerous. Indeed it is a "very low bar" to clear.[2]

[22] However, I will be returning to the grounds of appeal as I am required to take them into account in my analysis of the s. 679(3)(c) public interest component.

(b) Surrender into Custody

[23] The Crown is also not concerned that Mr. Sullivan will fail to surrender into custody—a required condition for bail pending appeal—in advance of the release of the decision in his appeal. Crown counsel notes that Mr. Sullivan has abided by the conditions of his Recognizance from the court below.

(c) The Public Interest Criterion

[24] In determining Mr. Sullivan's bail application I have focused on whether it is necessary in the public interest to continue his detention, this being the central issue before me. The following explains why I came to the view that bail should be denied.

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[1] *R. v. Oland*, 2017 SCC 17 at para. 19 (*Oland*).
[2] *Oland*, at para. 20.

[25] The public interest criterion has two components: public safety and public confidence. In Mr. Sullivan's case I am not placing emphasis on the public safety component as his risk would appear to be manageable in the community as it was during the period he was on release under his Recognizance without any breaches.

[26] The public confidence component involves "the weighing of two competing interests: enforceability and reviewability".[3] The enforceability component reflects "the need to respect the general rule of the immediate enforceability of judgments".[4] In other words, it is expected Mr. Sullivan will be held to account by continuing to serve the sentence imposed on him. The reviewability component reflects a recognition that our criminal justice system is not fail-safe and that appellants challenging the legality of their convictions "should be entitled to a meaningful review process…".[5]

[27] In *Oland*, the Supreme Court of Canada directed appellate judges considering motions for bail to apply the factors relevant to the public confidence criteria in pre-trial release. These factors are: the apparent strength of the Crown's case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the potential length of imprisonment.[6]

[28] A significant factor that weighs against Mr. Sullivan's release in the context of public confidence is the gravity of his offences. The seriousness of the offences may justify the denial of bail in order to maintain public confidence.[7]

[29] It is relevant that Mr. Sullivan was convicted of offences committed against a former intimate partner and perpetrated surreptitiously in her own home. At sentencing the trial judge described the serious character of the break and enter: "The factual foundation here is very serious, given the manner in which this offence was committed, and the purpose for which Mr. Sullivan gained entry". She rated Mr. Sullivan's moral culpability as high, indicating his actions were deliberate and calculated. The judge also considered S.R.'s victim impact statement and the harm caused by these crimes. The judge at sentencing summarized the impact on S.R. and her two children:

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[3] *Oland*, at para. 24.
[4] *Oland*, at para 25.
[5] *Oland*, at para. 25.
[6] *Oland*, at paras. 31-32.
[7] *Oland*, at para. 28.

> She described the way in which Mr. Sullivan's criminal offences turned this family's life upside down. She said this invasion of privacy was such a violation that "it rocked me to my core. I don't believe it is something you can ever forget about." She described the feelings of insecurity and the breach of their previously, peaceful lives which had a meaningful impact on the entire family.

[30] The trial judge described the offences as perpetrating "an extreme invasion of privacy" and an "egregious breach" of S.R.'s privacy and dignity.

[31] The offences were a violation of S.R.'s right to security and autonomy and her entitlement to move on with her life having ended the relationship with Mr. Sullivan. I agree with the Crown's characterization of the offences for which Mr. Sullivan convicted as a form of stalking. There is a significant enforceability interest in this case.

[32] The reviewability component is assessed in relation to the strength of the appeal.[8] *Oland* directs this assessment of the grounds of appeal is to be conducted "with an eye to their general legal plausibility and their foundation in the record".[9] The grounds must "clearly surpass the minimal standard required to meet the 'not frivolous' criterion".[10]

[33] I explained to Mr. Sullivan that my examination of the enforceability/reviewability components is limited to what I have before me. I read the trial judge's reasons on the *Charter* motions, the sentencing hearing transcript, and her sentencing decision. I reviewed Mr. Sullivan's Notice of Appeal. In addition, I had the written submissions of trial counsel on the s. 11(b) delay motion and I was able to access the audio-recording of the trial judge's s. 11(b) decision, delivered on November 7, 2022.

[34] As is common on motions for bail pending appeal, I do not have the trial transcript. It will be filed as a component of the Appeal Book. While that restricts somewhat the "preliminary assessment" to be made of the strength of Mr. Sullivan's appeal,[11] given the thoroughness of the trial judge's *Charter* decisions, I do not feel at a significant disadvantage. The transcript of the judge's decision on the *Charter voir dire* is 130 pages and she took 85 minutes to read her reasons on the s. 11(b) motion into the record.

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[8] *Oland*, at para. 40.
[9] *Oland*, at para. 44.
[10] *Oland*, at para. 44.
[11] *Oland*, at para. 45.

[35] At the bail hearing, Mr. Sullivan's submissions on his grounds of appeal primarily focused on arguments that will likely be made on appeal in relation to the trial judge's dismissal of the s. 11(b) stay motion. Listening to the judge's s. 11(b) decision enabled me to understand how she had dealt with the facts and issues referenced by Mr. Sullivan.

[36] I will note that the Crown and defence at trial acknowledged that the delay in Mr. Sullivan's case was presumptively unreasonable, which placed the onus on the Crown to demonstrate there had been exceptional circumstances justifying the delay.

[37] Mr. Sullivan was entitled to a trial in Provincial Court within 18 months.[12] His case, from the date he was charged to the date of final submissions, spanned just over 37 months. The judge found defence delay that brought the actionable delay down to 35 months and 16 days—the net delay. In an exacting and tightly reasoned decision, the trial judge concluded there were exceptional circumstances, including but not limited to, COVID-induced closure of the courts, that reduced the net delay to 16 months and 25 days and brought it within what is an allowable delay for a trial in Provincial Court. Consequently, she dismissed Mr. Sullivan's s. 11(b) motion for a stay of proceedings.

[38] Mr. Sullivan did an able job advocating for his release. However, I am not persuaded Mr. Sullivan's grounds of appeal against conviction are strong. The trial judge undertook a painstaking analysis of all the *Charter* issues raised. She correctly identified the applicable law. On a preliminary assessment, I did not see where she misapplied it. She referred extensively to the evidence, and in the s. 11(b) decision, explained in detail how the case progressed and what happened at various junctures. She made significant findings of fact. In her s. 11(b) decision, those factual findings suggest the case became more complex as it unfolded which is a relevant consideration in an analysis of delay. She examined developments in the case at a granular level and considered how the court and the parties responded to COVID and what was done to enable the trial to proceed. She was not persuaded that a lack of resources caused the delay in the case.

[39] Aspects of the trial judge's *Charter* decisions attract considerable deference on appeal, for example, how she exercised her discretion in balancing the factors in her s. 24(2) analysis. I note that having found s. 10 breaches she excluded Mr. Sullivan's police statement. This supports a view that she took a careful and

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

balanced approach to the evidence underpinning the *Charter* motions. In her s. 11(b) decision, she dissected what occurred within the case and the courts over the 37 months from when Mr. Sullivan was charged to final submissions. As for fitness of sentence, there is a high degree of deference afforded on appeal to the sentence imposed.

[40] I am also not persuaded that Mr. Sullivan's release plan, even with the increased restrictions he was prepared to accept, would contribute to public confidence. In the plan before me, he would not be living with or even near his surety. He would be subject only to a curfew. Outside of the hours under curfew, he would be attending to tenant calls at their apartments. The exception for travel to Bathurst is another feature of an overly liberal release plan where the convictions are for such serious offences.

[41] As I noted, Mr. Sullivan did say he would live with his sister if this was required by the Court. While that would place him under greater supervision, taking that into account in the final balancing of the public interest factors does not satisfy me bail should be granted.

The Final Balancing

[42] Bail pending appeal requires a "final balancing" of the enforceability and reviewability aspects of the public confidence factor. The "final balancing" must calibrate public confidence as viewed by reasonable, well-informed members of the public. The Supreme Court of Canada in *Oland* offered guidance on the approach to be taken:

> Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.[13]

[13] *Oland*, at para. 47.

[43] Assessing the public confidence component of the public interest criterion is a nuanced exercise. There is "no precise formula" for resolving the balancing exercise.[14] "A qualitative and contextual assessment is required".[15] The public interest in enforceability "will be high" and will "often outweigh the reviewability interest" where an appellant has been convicted of very serious crimes and "the grounds of appeal appear to be weak".[16]

[44] In this case, where the offences were very serious and the Crown's case was strong, I find the reasonable person would want to be assured of the strength of the grounds of appeal in order to have confidence in Mr. Sullivan's release. *Oland* directs me to apply my legal expertise and experience in evaluating the strength of the grounds. While recognizing the limitations that exist at the bail stage on making this assessment, I have not identified a strong ground of appeal.

[45] The sentencing ground of appeal—that Mr. Sullivan received an unfit sentence—is weak. At the sentencing hearing counsel for Mr. Sullivan recommended a sentence of two years' incarceration. The Crown recommended four. The judge decided a total sentence of three years for the offences was fit.

[46] As for the grounds of appeal relating to Mr. Sullivan's conviction, in my review of the trial judge's reasons on the *Charter voir dire*, the s. 11(b) stay motion, and sentencing, I have not seen errors of law that need to be corrected, or a patent injustice warranting appellate intervention. The trial judge paid close attention to the submissions of Crown and defence, considered and addressed the cases they provided, correctly stated the law, and made findings of fact. Her conclusions were clear and well-reasoned, grounded in the law and evidence.

[47] It will of course be for the panel on the appeal to undertake the necessary analysis governed by the applicable standards of review. I reiterate that those standards will include considerable deference to the trial judge in relation to: her underlying findings of fact, her s. 24(2) determination not to exclude the SD card, and sentence.

[48] This is not a case where bail pending appeal could have greater significance because the applicant will have served a significant portion of his sentence before the appeal is heard and presumably decided.[17] In any event, even where applicable,

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[14] *Oland*, at para. 49.
[15] *Oland*, at para. 49.
[16] *Oland*, at para. 50.
[17] *Oland*, at para. 48.

that consideration will be modified by the seriousness of the offences. Mr. Sullivan's appeal will be heard on June 12 by which time he will have served only approximately 6.5 months of his three year sentence. Consequently, the relationship between the length of Mr. Sullivan's sentence and the date for his appeal is not a factor I have considered in the enforceability/reviewability balancing.

**Conclusion**

[49] I find Mr. Sullivan has not displaced the burden requiring him to establish, on a balance of probabilities, that he should be released pending his appeal. His motion for bail is dismissed.

Derrick, J.A.