



**IN THE COURT OF APPEAL**  
**TURKS AND CAICOS ISLANDS**

**CR-AP 01/2023**

**BETWEEN:**

**Lopez Keno Williams**

**Appellant**

**Versus**

**Rex**

**Respondent**

**Before: The Hon. Mr Justice Adderley, JA, President (Ag.) (Presiding)**  
**The Hon. Madam Justice Cornelius Thorne, JA**  
**The Hon. Mr. Justice Hylton, JA**

**Appearances: Mr Oliver Smith K.C for the Appellant**  
**Ms Nayasha Hatmin for the Respondent**

**Hearing Date: 15 January 2024**

**Date Handed Down: 29<sup>th</sup> February 2024**



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**JUDGMENT**

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*Sexual Assault by Penetration – Appeal against Conviction and Sentence – Constitutional Rights- The Right of Review of Conviction or Sentence – The Right to a Fair Hearing - Incomplete Trial Transcript – The Effect of an Incomplete Transcript – Whether an Incomplete Transcript constitutes a deprivation of the Appellant’s Constitutional Rights.*

**Cases considered:**

*Evon Jack v R* [2021] JMCA Crim 31; *Treverson Saunders v Regina*; *Lincoln Smith v Regina* (CR-AP 7 of 2015; CR-AP 28 of 2015) [2017] TCACA 4 (1 December 2017).

**CORNELIUS THORNE, JA**

1. Sexual abuse of children plagues our societies. Cases involving sexual abuse are particularly sensitive because of the recognised vulnerability of the complainants, and the potential loss of freedom and reputation of the accused. The prosecution and adjudication of such matters are rife with legal difficulties which the courts must carefully negotiate. The most careful handling of the case must be taken by the State at every stage to protect the rights of both complainant and accused.
2. On 17<sup>th</sup> January 2023 Keno Williams, the Appellant, was convicted of one count of Assault by penetration contrary to Section 4 (1)(a) of the Sexual Offences Ordinance, Chapter 03.24. He was sentenced to a four-year term of imprisonment. He has appealed his conviction and sentence.

**Background**

3. The case for the Crown was that the Appellant was well known to the Complainant, who was 14 years old at the time the (alleged) offence took place. A series of WhatsApp messages were exchanged between them, in which the Appellant importuned her with request for sexual activity in return for money she requested. The Complainant saved some of the messages on her phone and took screenshots of others.

4. The Crown's case continued that she later sent these screenshots to another close friend. On the date of the offence while the Complainant was babysitting the child of the Appellant's girlfriend, the Appellant pushed her up against a wall and sexually assaulted her. Apart from her friend to whom she sent the WhatsApp messages and confided the incident, she told no one until she had an argument with her mother, to whom she then revealed the assault. The Appellant's defence was a total denial, asserting that the WhatsApp messages were a fabrication made to a proxy account set up by the Complainant, and that the sexual assault never happened. As in most sexual offence cases, the primary witness was the Complainant.

## **Grounds of Appeal**

5. The grounds of appeal were filed on 22<sup>nd</sup> March 2023 and amended by new Counsel on 27<sup>th</sup> December 2023. The amended grounds of appeal are:

### Ground 1-Incomplete and Inadequate Trial Transcript

The incompleteness and inadequacy of the trial transcript it's patently reflected in the missing sections of the evidence of witnesses as to material facts, as well as the absence of sections of the trial judges (sic) summation to the jury. Such lacuna constitutes a breach of the right of the appellant to have adequate time and facilities for the preparation of his defence (appeal) as guaranteed under section 6(1) (c) of the Turks and Caicos Islands Constitution Order 2011.

Further the incompleteness and inadequacy of the trial transcript, as an example, the absence of the evidence in chief of the virtual complainant, further constitutes a breach of the right of the Appellant to have a copy of the record of the proceedings made by or on behalf of the court, as guaranteed under the said section 6(3) of the Turks and Caicos Islands Constitution order 2011.

The cumulative effect of the several cited instances of missing transcripts and the multiplier inadequacy, results in the denial of the constitutional rights set out above and as such the appellant has been, is being and is likely to be denied due process contrary to the Constitution.

#### Ground 2-Admissibility of Computer-Generated Evidence

The learned trial judge erred in allowing the photographs of screenshots evidence. Resolution involves determining whether the screenshot evidence was authenticated so as to meet the test of admissibility. Resolution also requires addressing the issue of the integrity of the electronic system on which the evidence was stored.

The erroneous admission of the photographs prejudice (sic) the appellants case rendering the trial unfair.

#### Ground 3-The Learned Trial Judge failed to Direct Jury as to Crown's exhibit 19

The Learned trial judge judge (sic) failed to direct the jury as to how to approach the WhatsApp messages and or failed to offer any meaningful assistance to hold to the jury on how to deal with the screenshots of WhatsApp messages.

Having admitted such evidence and allowing the case to go to the jury, the learned trial judges (sic) summation was vague and inadequate. It did not assist the jury sufficiently with how to treat the factual and legal issues concerning the photographs contained in the Crown's exhibit 1.

#### Ground 4 Inadequate summation

The learned Trial Judge's summing up was inadequate as the Trial Judge failed effectively Marshall (sic) the evidence to the jury during her charge.

### **Ground One: The Incomplete and Inadequate Trial Transcript**

6. Substantial parts of the transcript are inexplicably missing. The entire first part of the summation, the general directions on the all the required matters, for example the standard of proof, how to deal with circumstantial evidence, and the directions on the elements of the offence are not available for the perusal of the Court. The transcript starts with the Judge's review of the evidence, which admittedly appears to be quite thorough. However, in a case where the most important evidence is that of the Complainant, that too is missing, although the cross examination conducted by the Appellant's first attorney is recorded. On reading the transcript, the Court notes that it stops abruptly during the course of the re-examination and restarts on January 10<sup>th</sup> with a new witness with no indication that the Crown had finished the re-examination or the time that the Court adjourned. The cross-examination and parts of the examination- in- chief of the Police Officer Skippings is also missing. No explanation has been given by the Prosecution, in circumstances where the Crown refers specifically to the evidence-in-chief of the Complainant in its arguments.

### **The Effect of the Incomplete Transcript:**

7. Section 6 (12) of the Turks and Caicos Constitution Order 2011 provides:
  6. (12) Every person convicted of a criminal offence by a Court shall have the right to have his or her conviction or sentence reviewed by a higher court, and the exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

Sections 6 (1) and 6 (3) provide:

6. (1) If any person is charged with a criminal offense, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

6(3) When a person is tried for any criminal offence, the accused person or any person authorized by him or her shall, if he or she so requires and subject to payment of such reasonable fee as may be prescribed in the law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings by or on behalf of the court.

8. In *Treverson Saunders v Regina; Lincoln Smith v Regina* (CR-AP 7 of 2015; CR-AP 28 of 2015)[2017] TCACA 4 (1 December 2017) this court dealt exhaustively with the effect of missing transcripts. In its joint decision the Court (Mottley P, Stollmeyer and Adderley JJA) commented on parameters of the right under section 6(12) at paragraphs [4] and [5]:

*“The right under section 6(12) does not exist in a vacuum and is only meaningful if a duty is cast upon someone to protect the right. In the opinion of the court, the trial judge has the duty and responsibility to ensure that a proper record of the trial is being maintained. If the evidence and summation are being mechanically recorded it is the responsibility of the trial judge to ensure the equipment provided is working properly. This should not be taken that the judge must himself check the equipment. What it means is that the judge should ensure that the proper equipment is in place and it is in proper working order. This is done by ascertaining from the person responsible for the maintenance and operation of the equipment that it is working properly.*

*The right to fair trial does not end at the trial on the indictment or on information. Without the existence of the proper record of proceedings of the trial before the judge including the summation to the jury (in jury trial ) or reason for the judge decision (sic) ( in a trial without a jury), an appellant would be denied his right to have a Court of Appeal review his conviction or sentence.”*

9. With reference to the appeal of Saunders, where the transcript of the summation was missing, the Court rejected what was offered in the Record of Appeal as merely an “*aide memoire*” in the form of the typed notes of evidence from the judge’s notebook and unacceptable. Mottley P’s dicta at paragraphs [12] to [15] bears repeating as they remain apposite in this case:

*“The importance of the summation to the criminal trial cannot be over emphasized. It is the responsibility and duty of the jury to find the facts of the case having been directed by the judge as to what is the law to be applied in the particular case. Without a direction on the law from the judge, the jury would not be able to apply the law to the facts of the particular case. In these circumstances, it is absolutely essential that, a Court of Appeal which is going to review what took place at the trial, have before it the summation of the judge to the jury to ensure that the judge directed the jury in accordance with the law.*

*The summation will show what assistance the judge gave to the jury in assessing the issues that arises in any particular case. The accused is guaranteed a fair trial under the provisions of section 6 of the Constitution.*

*In addition to the fair trial provision of the Constitution, the Constitution gives a person convicted of a criminal offence the right to have his conviction and sentence reviewed by a Court of Appeal.*

*In order to perform this function, a Court of Appeal, would have to have before it the summation delivered by the judge at the trial. A Court of Appeal needs to be aware of the direction given to the jury by the trial judge.”*

10. In *Saunders* the entire transcript was missing and in *Smith* there were “*numerous significant lacuna*” in the evidence of the witnesses and in the judge’s summation. In this case before us there is a substantial transcript of the evidence of the witnesses and at least two-thirds of the Judge’s summation has been recorded, but the unavailability of missing portions, particularly the examination-in-chief of the Complainant and the general directions makes the issue no less grave. As the Judge herself noted in her review of the evidence of the Complainant, the case boils down to the word of the Complainant. The Appellant and his attorney and the Court are entitled to have more than the Judge’s interpretation of the evidence before them to determine this Appeal.
  
11. The Prosecution has argued that the lack of a trial transcript is not always fatal to a case. In *Evon Jack v R* [2021] JMCA Crim 31 the Court of Appeal of Jamaica noted that it was more likely to be fatal if it was combined with other factors, such as delay. I find that in the context of this case, the importance of the evidence of the Complainant and the other missing portions is sufficiently serious to establish that there is a constitutional deprivation of his rights.
  
12. It is useful to repeat the injunction of Court in *Saunders* at paragraph [17] that “*in future it is the responsibility of the Registrar and staff of the Registry to secure the record of proceeding from which the Record of Appeal is to be prepared*”. Clearly, that future is now. While technological failures cannot be predicted or always avoided, the circumstances in which a woefully inadequate



transcript is presented to this Court with no explanation should henceforth be rare.

13. There has been no significant delay in this matter to the level of the eight-year delay in *Evon*. The Appellant was convicted on the 17<sup>th</sup> January 2023 and sentenced on the 17<sup>th</sup> March that year. There are few witnesses, and the evidence of the Complainant is the mainstay of the Prosecution's case. It is therefore a suitable candidate for a retrial.

### **Disposition**

14. I would allow the appeal, quash the conviction and sentence and order a retrial.

15. In the circumstances, it is prudent to not deal with the other grounds of appeal so as not in any way to tie the hands of the judge rehearing the matter.

February, 29 2024

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Cornelius-Thorne, JA

I agree

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Adderley, JA, President (Ag)

I also agree

Hylton, KC, JA

