Neutral Citation Number: [2026] CA (Bda) 24 Crim

Criminal Appeal No. 7 of 2023

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. JUSTICE JUAN WOLFFE
CASE No. 36 of 2019

Dame Lois Browne-Evans Building
58 Court Street
Hamilton HM 12
Bermuda

Date: 20 November 2026

Before:

THE HON IAN KAWALEY, PRESIDENT
THE HON NARINDER HARGUN, JUSTICE OF APPEAL
and
THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

- -

Between:

JOHN DEXTER SEAMAN

Appellant

-and-

THE KING

Respondent

Appearances: **Ms Susan Mulligan, Legal Aid Office, for the Appellant**
Mr Karim Nelson and Ms Taneka King, Office of the Director of Public Prosecutions, for the Respondent

Hearing date(s): **13 November 2026**
Draft judgment circulated: **16 November 2026**
Date of Judgment: **20 November 2026**

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Appeal against conviction for offences of unlawful carnal knowledge and sexual exploitation-whether trial was unfair on the sole ground of inadequate legal representation-importance of record of clients' instructions if accused calls no evidence

JUDGMENT

KAWALEY, P

Introductory

1. On 24 April 2023, the Appellant was arraigned on an Amended Indictment containing the following 9 charges involving two complainants:

    (a) attempted carnal knowledge (Counts 1 and 6);

    (b) unlawful carnal knowledge (Counts 2 and 4);

    (c) sexual exploitation (Counts 3, 7, 8 and 9);

    (d) sexual exploitation in a position of trust (Count 5).

2. He was tried by Hon Juan Wolffe J and a jury. On 16 May 2023 majority guilty verdicts were recorded on Counts 1-8[1], with a unanimous acquittal on Count 9. On 6 June 2023 the Appellant appealed against his convictions on the following sole ground:

    "*1. That he did not have a fair trial as he did not have adequate legal representation*."

3. The sentencing hearing took place on 2-3 October 2023 and the Appellant appeared in person, having seemingly dispensed with the services of trial counsel Mr Charles Richardson. On 30 November 2023, he received concurrent sentences ranging from 13 years to 18 years imprisonment with his record of previous similar convictions treated as an aggravating circumstance.

[1] 11-1 on Counts 1,2 and 6; 10-2 on the remaining counts.

Governing legal principles

The Appellant's written submissions

4. Ms Mulligan's opening submissions on the proper legal approach was set out in her Skeleton as follows:

> "*9. It is respectfully submitted that counsel failed to keep a proper record of his instructions, did not take a proof of evidence from the Appellant and is unable to produce signed instructions indicating that the Appellant understood he could choose to testify and freely decided not do so, that the Court ought to resolve any disagreement between the Appellant's evidence and Counsel's evidence in favour of the Appellant.*"

5. Reference was made to various authorities in support of the proposition, that it was an important rule of practice that written instructions be recorded to evidence a defendant's decision not to give evidence:

- Supreme Court Circular No. 7 of 27 May 2008 (Richard Ground CJ);
- *Gardner-v-R* [2016] Bda LR 63
- *Ebanks-v-R* [2006] UKPC 16;
- *Bethel-v-The State (Trinidad & Tobago* [1998] UKPC 51;
- *Tamerry-v-R* [2007] CA (Bda) 8 Crim;
- *Sousa, Tucker & Simons-v- R* [2010] Bda LR 76;
- *Brangman-v-R* [2018] CA (Bda) [¿];
- *Jahmico Trott-v-R* [2018] CA (Bda) [¿].

6. It was contended that Bermudian courts focus on the impact of counsel's conduct rather than attaching any particular label of culpability, following the Privy Council's approach in *Bethel* which was slightly modified in *Boodram-v- The State* [2001] UKPC 21 at [29]. The Jamaican Court of Appeal case of *Barrett-v- R* [2022] JMCA Crim 24 (at [11]-[13], [39]) was also commended to this Court. The specific judicial statements relied upon were as follows.

7. Reference was made in *Jahmico Trott* to the following passage in the judgment of Sir Christopher Clarke P:

> "*80. We would add that the absence of any record or note of the decision not to call Ms Darrell makes it difficult to discern exactly what was the sequence of events*

> *and the content of any discussion between lawyer, client and potential witness; and, in the light of certain further matters, to which we refer in an addendum to this judgment, which is not to be published without our leave, we have considerable concern as to exactly what the position was, and the nature of the discussions, when the question of whether or not to call Ms Darrell fell to be resolved.*" [Emphasis added]

8. Ms Mulligan (Skeleton Argument at [17]) invited the Court to disclose the unpublished Addendum if we thought it relevant to the present appeal. The Addendum was reviewed by the panel initially assigned to hear the appeal in the March 2026 Session (before it was delisted) and found not to be relevant.

9. It was further submitted that Bermudian courts have consistently focused on the effect of counsel's conduct rather than the conduct itself, in line with the observations of the Privy Council in *Boodram-v-The State* [2001] UKPC 20 at [29] (Lord Steyn). Next, reliance was placed on this Court's decision in *Sousa, Tucker & Simons-v- R* where Sir Anthony Evans JA held

> "*73. We therefore have approached the matter in the following way. If and to the extent that there are valid criticisms of the way in which Vernon Simons' defence was conducted, the Court nevertheless must consider what effect, if any, that had upon the course of the trial and upon the safety of the jury's verdict.*"

10. Reliance was finally placed on the following passages in *Barrett-v-R* [2022] JMCA Crim 24 where the Jamaican Court of Appeal cited, *inter alia*, the following passage from *Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh* [2014] CCJ 11 (AJ) (per Justices Nelson, Saunders and Hayton):

> "*[13] A conviction can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial: see* ***Boodram v The State****. Hypothetical examples of such incompetence were given by the Privy Council in* ***Bethel v The State (No. 2*** *as follows:*
>
> > *"It is not difficult to give hypothetical examples of how such a situation might occur. An obvious example would be if the accused had the misfortune to be represented by counsel whose judgment was proved to have been impaired by senility, drugs or some mental disease. Another example … is if counsel conducted the defence without having taken his client's instructions'.*"

The Respondent's written submissions

11. The pivotal written submissions of the Respondent were the following:

> "*12. It is our humble submission that a high threshold must be met to set aside a criminal conviction on the basis of the incompetence of counsel. See Paul Lashley and John Campayne [2014] CCJ 11 (AJ)*

> *13. In Fox v. R*[2]*, this Court held inter alia in quoting R v Clinton (1993) 97 Cr App Reports 320, R v. Thakrar [2001] EWCA Crim. 1096, Boodram v. The State of Trinidad and Tobago [2001] UKPC 20 and R v. Day [2003] EWCA 1060; that it could not be said that the conduct of defence counsel was flagrantly incompetent, that the test of the conviction is the single test of safety, and the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent, and that there must be identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe….*
>
> *17.It is therefore our respectful submission that notwithstanding the tactical decisions of Counsel, they did not prejudice the Appellant in the way in which his defence was advanced at his trial, nor did they deprive him of a fair trial and there was a very strong case against him in any event. Sankar v. The State of Trinidad and Tobago [1995] 1 All ER 236.*" [Emphasis added]

12. In effect it was agreed that the critical test was whether anything had occurred at trial which rendered the Appellant's conviction unsafe. However, a number of potentially important subsidiary points of legal principle were also advanced, including most notably the threshold for validly impugning the conduct trial counsel on appeal:

> *"It is our humble submission that unless it can be shown that no reasonably competent counsel would sensibly have adopted the course taken in light of the information available at the time, grounds of appeal criticizing the conduct of the Defence Counsel should not be advanced. Doherty & McGregor [1997] 2 Cr App R 218…*"

Oral argument on the governing legal principles

13. In appropriately brief oral argument on the governing legal principles, Ms Mulligan submitted that the core consideration for the Court was whether not the conduct of Defence counsel at trial resulted in an unfair trial, or at least the appearance of an unfair trial. Mr Nelson replied that there was no material dispute on the governing principles although he emphasised the need for the Court to decide whether or not the convictions were unsafe.

Legal findings

14. The Court was assisted by the fulsome way in which the governing legal principles were addressed by counsel in their respective written submissions which were supported by the relevant authorities. In light of the oral evidence heard during the present appeal, it is now clear the merits of the appeal depend primarily on an evidential analysis. The applicable law for these purposes can be stated shortly. As this Court stated in *Fox-v-R* [2008] Bda LR 69 (Sir Austin Ward JA):

[2] [2008] Bda LR 69.

> "*We also considered R v Day[2003] EWCA Crim 1060 at paragraph 15 where it was held that 'while incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in Thakrar[2001] EWCA Crim. 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.* '" [Emphasis added]

15. The observations of Sir Christopher Clarke P in *Jahmico Trott-v- R* [2019] CA (Bda) Crim are instructive because they focus on the forensic task an appellate court must carry out when faced with the main complaint in the present case, namely that the conduct of trial counsel in failing to call evidence deprived the Appellant of a fair trial:

> "*The circumstances in which this court will overturn a conviction on account of the supposed failings of counsel must of necessity be extremely rare: R v Clinton [1993] 2 All ER 998. An egregious failure to call critical evidence ('when all prompting of reason and good sense pointed the other way') may have that consequence. But, in general, appellants are not to have their convictions set aside because a tactical decision was taken one way and the opposite decision might have led to a different result.*" [Emphasis added]

The Appellant's complaints about his legal representation at trial

16. The Appellant set out his complaints about his representation by Mr Charles Richardson at and before trial in an Affidavit sworn on 16 January 2026. The complaints may be summarised as follows:

    (a) counsel never met with the Appellant before trial (and failed to take a written proof of evidence);

    (b) counsel failed to file a Defence Statement;

    (c) counsel failed to take instructions or give advice during the trial. He told the Appellant to keep quiet during the trial;

    (d) counsel appeared to be conflicted by his repulsion for the offences with which the Appellant was charged;

    (e) counsel failed to apply to stay the proceedings on abuse of process grounds because of the Police's failure to properly investigate and failed to call

witnesses who could have assisted the Defence (in particular to prove that the offences said to have occurred at the Leopard's Club could not have taken place when the first complainant ("A") said they did);

(f) counsel failed to positively put to A that she had made false allegations against other men in the past and only recanted because the Police discovered she had been lying;

(g) counsel failed to properly cross-examine A and the second complainant ("B") to challenge their evidence that they watched a horror movie at the Little Theatre with the Appellant prior to one of the offences involving A. The Manager of Little Theatre could have been called to say children of their age at the time would not have been allowed to see that film;

(h) counsel made false suggestions to witnesses without the Appellant's instructions;

(i) counsel strongly advised the Appellant, who wanted to testify in his own defence, not to testify and did not explain the advantages and disadvantages: "*I did what Mr Richardson told me to do*" (paragraph 33)

17. These complaints were set out in more legalistic terms in the Appellant's Skeleton (at [8]).

Mr Richardson's response

18. Mr Richardson averred as follows:

(a) he had several WhatsApp video meetings with the Appellant before trial;

(b) he did not file a Defence Statement on the considered basis that no such requirement existed at the time of the relevant offences, and the Prosecution did not challenge this position;

(c) he did not act unprofessionally towards the Appellant. They had "*spirited disagreements*" over tactical matters and he spoke to the Appellant "*firmly*" when he wished to pursue "*imprudent matters*". The Appellant ultimately accepted counsel's advice;

(d) he was not "*repulsed*" by the allegations in the case;

(e) he considered an abuse of process application, but felt it would be rejected. He spoke to the potential witnesses in relation to the Leopard's Club offences

and decided their evidence would potentially be more harmful than helpful. The Appellant eventually accepted this advice;

(f) why A recanted in the other case was not explored because it was a "*double-edged sword*";

(g) he does not recall being given instructions about a witness in relation to the horror film issue;

(h) the complaint that counsel made some false suggestions to witnesses was not directly answered;

(i) he did not tell the Appellant that he could not testify. The pros and cons were discussed. The Appellant was given counsel's "*candid view*" that he had to decide whether he thought he could "*safely navigate cross-examination*" (paragraph 14).

Preliminary view of the written evidence

19. It is noteworthy that no complaint is made about the directions given by the Learned Judge in a difficult case. That suggests that there was no failure by counsel to assist the Judge with any directions resulting in unfair prejudice to the Appellant. All convictions were based on majority verdicts with a unanimous acquittal on one Count. This indicates (in favour of the Crown) some impact by the Defence on the way the jury viewed the case. This would also potentially suggest (in favour of the Appellant) that if a credible critical witness was not called, a reasonable opportunity for an acquittal may have been lost. It also noteworthy that in the course of the trial Mr Richardson made various applications about how witnesses should be questioned and what evidence was admissible. Transcripts in relation some seven applications are included in the Appeal Record. Mr Richardson's submissions were only entirely rejected in two of those occasions. This was not a trial where the Appellant was represented by an obviously incompetent or inexperienced lawyer.

20. The specific complaints have to be evaluated on their own merits in light of the legal principles governing this type of ground of appeal, the most important single ground (because of its obvious potentially significant impact) was the complaint that his counsel told him not to give evidence when he wished to do, causing him to reluctantly accept counsel's advice. This complaint was really only arguable on its face because Mr Richardson was unable to produce the written consent that Defence counsel have been repeatedly enjoined to retain precisely for the present circumstances.

21. Based on the documentary record, however, it was difficult to avoid forming an initial impression that the Appellant might well have overstated how overbearing his trial counsel was, implying that at trial he effectively told him that "children are to be seen

and not heard" and understating the extent of the advice he received. As regards Mr Richardson's written evidence, one formed the distinct initial impression from certain euphemistic words used (such as "*firmly*" and "*candidly*"), that he may well have forcefully delivered his advice in relation to "*imprudent matters*" and the "*pros and cons*" of giving evidence was given.

Factual findings

22. The main complaints which were pursued at the hearing were that Mr Richardson (1) had failed to advise the Appellant of his right to give evidence and/or to permit him to make a free decision on the matter, and (2) failed to call two witnesses who could have proved he could not have committed the first count on the Indictment. To the extent that any other complaints were not formally abandoned, I would summarily dismiss them in any event.

23. The Appellant gave evidence and, in terms of general impression, did little to support a finding that his failure to testify at trial was an "*egregious failure to call critical evidence ('when all prompting of reason and good sense pointed the other way')*". He was not an easy witness for his own counsel to control and was prone to tangential rather than direct responses to questions. The Appellant's reluctance to accept inconvenient truths was first displayed by his refusal to initially accept that, before Wolffe J appearing as a litigant-in-person, he had ill-advisedly refused to accept at the sentencing hearing that he had a previous conviction for a similar sexual offence. The result in the Supreme Court was that fuller details of the previous offence were placed before the Judge than would otherwise have occurred. In addition, notable inaccuracies in his written evidence were established, principally:

    (a) he deposed that he never met Mr Richardson in person to give instructions before trial. He orally admitted two in-person meetings at Mr Richardosn's home;

    (b) he deposed that Mr Richardson failed to properly cross-examine the complainants. He orally withdrew this complaint when shown a glowing WhatsApp compliment he sent to Mr Richardson about his skilful cross-examination during the trial;

    (c) he deposed that Mr Richardson never advised him of the pros and cons of testifying in his own defence. He orally admitted that Mr Richardson had advised him that "*my truthfulness as a witness would harm me*", which was broadly consistent with Mr Richradson's account that he strongly advised the Appellant that testifying would hurt rather than help his defence.

24. Mr Richardson gave his evidence overall in a straightforward and entirely credible manner. That the Appellant understood that it was ultimately his choice but agreed,

perhaps reluctantly, was supported by three significant matters. Firstly, he was clearly an articulate, assertive and intelligent man. As Mr Nelson put it, not a "*docile*" defendant whose will could easily be overcome by counsel. Secondly, he had several previous convictions for offences of dishonesty which could have been put to him in cross-examination, even if the previous similar convictions were excluded. And thirdly, the detailed written instructions which the Appellant was shown to have sent to Mr Richardson to assist with the Defence closing speech suggests that the Appellant was actively involved with the strategy of calling no evidence for the Defence. On the evidence, I am satisfied to the requisite standard that Mr Richardson appropriately advised the Appellant who freely, if sometimes reluctantly, chose the procedural path he wished to follow and gave Mr Richardson instructions accordingly.

25. Ms Mulligan rightly submitted that it was unsatisfactory that Mr Richardson had failed to retain the record he said he at one time kept of the Appellant's signed consent to the decision not to give evidence. He had been criticised in *Jahmico Trott* for the absence of record of his client's consenting to a decision not to call a key witness. However, Practice Direction A/50 (Circular No. 8) of 27 May 2008 ("*Written Instructions in Criminal Cases*") only requires a note to be kept of the decision of an accused not to give evidence "*and brief reasons for it*". I would respectfully suggest an obligation to record reasons for the decision goes beyond what is required based on the cited authority cited in the Practice Direction of *Ebanks-v-R* [2006] UKPC 16 at [17]. What ought to be recorded is (a) the accused's consent and (b) confirmation that counsel's advice has been accepted, without having to reveal the content of that advice. That said, in exceptional cases where a key witness or witnesses are deliberately not called, the *Jahmico Trott* case illustrates why such a record of instructions is desirable.

26. As for the failure to call other witnesses for the Defence, it should suffice to note that no positive evidence was placed before us which was capable of supporting a factual finding that potentially critical evidence was not adduced. Rather than producing witness statements confirming what the supposedly helpful witnesses would have said, the Appellant relied on his own assertions that a Mr and Mrs Simons would have given evidence. Mr Richardson accepted that as regards Count 1, he spoke to Mr Simons who confirmed that the offence could not have been committed on the date in question because the Appellant did not have access to the premises where the offence occurred. However, he would likely (under cross-examination) have confirmed a relationship between the Appellant and A at a later date, albeit one when A was above the age of consent. This evidence was not adduced for two reasons trial counsel explained. Firstly, Count 1 was only one of several charges (and so the overall position had to be taken into account) and secondly Mr Simons (who was living abroad) ultimately declined to give oral evidence. The suggestion that other girls who one complainant alleged had been involved in relationships with the Appellant should have been pursued as potential Defence witnesses seemed at first blush to be a nonsensical one. On the basis of Mr Richardson's evidence, which I accept, there is no basis for finding that critical evidence which should clearly have been adduced was not called for the Defence at trial.

Duty of counsel to keep a record of instructions

27. In the present case, accepting Mr Richardson's evidence that he initially recorded the Appellant's consent, the letter of the Practice Direction has not been broken but the spirit clearly has been. Destroying a record without satisfying oneself that it will not be needed is barely distinguishable from not preparing the record at all. Even if no record had ever been made, such a failure would have no bearing on the outcome of the present appeal as the same evidential inquiry would have been carried out. Ms Mulligan rightly submitted that it was unsatisfactory that Mr Richardson had failed to retain the record he said he at one time kept of the Appellant's signed consent to the decision not to give evidence. He had been criticised in *Jahmico Trott* for the absence of record of his client's consenting to a decision not to call a key witness. However, Practice Direction A/50 (Circular No. 8) of 27 May 2008 ("*Written Instructions in Criminal Cases*") only requires a note to be kept of the decision of an accused not to give evidence "*and brief reasons for it*". I would respectfully suggest an obligation to record reasons for the decision goes beyond what is required based on the cited authority cited in the Practice Direction of *Ebanks-v-R* [2006] UKPC 16 at [17]. What ought to be recorded (based on *Ebanks)* is (a) the accused's consent to give evidence himself and (b) confirmation that counsel's advice has been accepted, without having to reveal the content of that advice. That said, in exceptional cases where a key witness or witnesses are deliberately not called, the *Jahmico Trott* case illustrates why such a record of instructions is desirable. Although this is not covered by the Practice Direction as presently drafted, perhaps it ought to be. To be clear, I have found above that there is no evidence that any key witnesses were not called in the present case. And any such extension of the presently established rule of practice would only to my mind be justified in exceptional cases where a decision was made on advice for the defendant not to call a witness who was critical to the defence, credible and willing to assist.

28. Mr Richardson pointed out in his evidence that there is no mandated retention period for criminal instruction records, some practitioners have limited storage space and an appellant ought to promptly notify former counsel of an inadequate representation appeal. The purpose of the record may seem unimportant to overworked lawyers consumed by a passion for substantive justice. But the entirely pragmatic goal of conserving public resources and preventing the need for appeals such as this to adjudicate whether an accused person received appropriate advice has indirect substantive benefits. It allows lawyers and judges to focus on meritorious cases undistracted by cases which are only being pursued to exploit record-keeping loopholes on the part of able advocates who may well regard "administrivia" with contempt. Taking the notorious pressures and limited administrative resources of Bermudian criminal defence lawyers into account, I would respectfully suggest that consideration be given to the following practical approach. Preparing and using when needed a standard typed form containing words to the following effect: "I [ ] have been advised that I have the right to give evidence and call witnesses in my own defence. I have accepted the advice that I should [not give evidence/

[not call key witness] in this case. Dated [ ] Signed [ ]". If a digital photograph is taken of such a form when it is signed, it should be easier to retain the digital record for a reasonable time than it is to maintain a physical record. What is a reasonable time? In the present case, trial counsel was not approached to provide evidence in support of the appeal until nearly three years after that trial. Where a client has sacked trial counsel following conviction, the assumption ought to be that there will be an appeal and that new counsel will be instructed. Both new and former counsel have a mutual obligation to ensure that all records of instructions are transferred before the former trial counsel destroys any records. The Court could perhaps assist by including in the initial appeal directions in appeals which include an inadequate counsel ground for the former trial counsel to transmit any records of instructions relating to waiving the right to testify and/or call a key witness to replacement counsel and/or the Court. A small measure of common sense on the part of all involved in the criminal appeal process could well be more curative than a more elaborate regulatory scheme.

Conclusion

29. Ms Mulligan could not have presented an ultimately hopeless appeal in a more effective manner. She pursued every legal point of possible merit available to the Appellant with skill and care. As Mr Nelson put it, the Appellant was desperate and clutching at straws and Mr Richardson (who had conducted the defence expertly albeit without complete success) was simply a straw in the Appellant's grasp.

30. I would for the above reasons dismiss this appeal.

Hargun JA

31. I agree.

Hickinbottom JA

32. I too agree, and would just add two brief observations.

33. First, the impression I got from Mr Richardson's evidence was that, given the circumstances of this case and without going beyond what was proper, he gave the Appellant very firm advice in relation to (e.g.) the pros and cons of him giving evidence. I would emphasise that, in an appropriate case, a defence counsel is not only able but obliged to give clear and firm advice to a defendant. So long as it does not override the defendant's free will with regard to instructions, such proper advice, if followed, does not make a trial unfair or a verdict unsafe. In this case, for the reasons given by my Lord the President, I am quite satisfied that the Appellant was able to consider the advice given and freely make up his own mind what he wanted to do.

34. Second, I would especially associate myself with the comments of the President with regard to the making and retaining of a written record of important instructions in criminal cases, such as instructions that a defendant has been appropriately advised of his rights and has freely chosen not to give evidence on his own behalf.