JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 15/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

KEITH NICHOL v R

Mr Bert Samuels, Miss Bianca Samuels, Miss Daynia Allen and Miss Marisa Benain for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mrs Karen Seymour-Johnson for the Crown

20 June 2017 and 5 March 2018

SINCLAIR-HAYNES JA

[1] Mr Keith Nichol (the appellant) was tried in the Home Circuit Court by Graham-Allen J and a jury for the offence of indecent assault upon a male. He was convicted and sentenced to three years imprisonment at hard labour.

[2] A single judge of this court granted his application for leave to appeal against conviction and sentence with a recommendation that an early date for the hearing of the appeal be fixed. On 20 June 2017, we heard and allowed the appeal, quashed the

conviction, set aside the sentence and entered a judgment and verdict of acquittal. We promised to put our reasons in writing. This is a fulfilment of that promise.

The Crown's Case

[3] In August 2006, the appellant conducted a summer football camp at St Andrew Technical High School. The complainant, FS, was among the students who attended. Three years later he complained to his mother that whilst at the camp, one morning, the appellant woke the boys and instructed them to go out and run. According to the complainant, he felt tired and asked for permission to remain in the classroom to sleep. His request was granted.

[4] He was awakened by the feeling of something in his shorts which he discovered was the appellant's hand rubbing his penis. He slapped away the appellant's hand and the appellant told him to "relax and stop gwaan like a idiot".

[5] He was invited by the appellant to watch a pornographic movie. The complainant refused and attempted to get off the sleeping bag but was prevented by appellant who held his hand and pulled him back. The appellant "took out" his penis and demanded that the complainant play with it. This solicitation was also refused. The complainant told him that he was "not into that".

[6] The appellant pulled the complainant's hand and forced him to play with his penis. The complainant was consequently very embarrassed and frightened. It was the complainant's evidence that during the ordeal, he was able to see the appellant

because there were four electric bulbs in the area. He was able to view his face for approximately one minute and 15 seconds.

[7] The complainant wrested his hands from the appellant's grasp, got up from the sleeping bag and stood by the door of the classroom. The appellant instructed him to run the route the others were instructed to run and return to the school. He obeyed.

[8] According to the complainant, he did not tell his mother about the incident because he felt ashamed and did not want her to know what had happened to him. The incident began to "stress him out" and sometime in 2009, he told someone whose identity was not disclosed, what had allegedly occurred between the appellant and him. He was encouraged to tell his mother. He eventually told her and she went to the school and informed the principal.

[9] The day the matter was reported to the principal, the appellant saw the complainant and enquired of him the reason his mother was at the school. He told him that his mother was there to report the incident. The appellant cried and begged the complainant to tell his mother that he was sorry.

[10] While they were in the principal's office, the appellant told him that he thought his mother's visit to the school was consequent on allegations that he had caught some boys having sexual intercourse with girls in a bathroom at the school.

The appellant's mother's evidence

[11] It was the evidence of TF, the complainant's mother, that consequent on what the complainant told her, she went to the school and spoke with the principal. While she was waiting to see the principal, the appellant came to her and knelt before her and begged her to speak with him. She however dialled the police and the appellant went outside.

[12] It was also her evidence that she spoke with the principal and while she was descending the stairs, the appellant threw himself on her, hugged her and asked her to return with him to speak with the principal. She returned to the principal's office where she saw the appellant "rolling on the floor and crying".

[13] The principal asked him what "happened to [him]" and he told her that he had caught the boys and a girl having sex in the bathroom and so he thought she would have sent him home. The principal enquired of the appellant what action he took upon making that discovery and he told her that he sent them home. She further testified that he told the principal that he later understood that that it was "betting and losting" so he thought the principal would have sent him home. The principal however told him that "if that [was] the case" he had nothing to worry about.

The defence

[14] The appellant, in his unsworn statement, emphatically denied the allegations and insisted that the complaint was "a total lie". He explained that the complainant was a

football recruit from another school who participated in a weekend football in camp August 2006 which "ended injury free".

[15] It was his evidence that upon seeing the complainant's mother in September 2009, at the administrative office, he greeted her several times and attempted to speak to her but she did not respond. He went to his office but later returned to the general office. He was invited by the principal into her office where the complainant's mother was seated. The principal asked him if there were problems between him and the complainant and he denied that there was any.

[16] He however told the principal that there was something he wished to tell her and should have reported to administration. With her permission, he told her that there were incidents with FS and other boys engaging in sexual activity with grade nine girls in the classroom which he should have reported earlier, but feared being charged with aiding and abetting and not reporting the incident to the authorities. The principal however told him that was not the reason they were there. He returned to train the team.

[17] Sometime in December 2009, during the mid-term examinations, he was advised that someone was inquiring for him. He later discovered that the persons were police officers. He was taken to "Retirement Road" where he was met by his attorney. He was questioned, to his surprise, about the allegations that were made by the complainant. Being utterly shocked at the allegations, he cried.

[18] He vehemently denied the complainant's mother's evidence that he rolled on the ground and cried at the school. It was his evidence that it was upon hearing the allegations, which left him in a state of "shock", that he "started to cry and thing up there" at Retirement Road.

[19] He testified that he had been a coach for more than 20 years and "no one has so much as called his name in a negative light". He pointed to the fact that he was still employed as a coach by the school up to the time of his trial.

The grounds of appeal

[20] Five grounds of appeal were originally filed by the appellant. Counsel abandoned the original five grounds filed and leave was granted to argue five supplemental grounds. The supplemental grounds of appeal are:

> "Ground 6
>
> The Trial Judge failed to give the appropriate identification directions to the jury.
>
> Ground 7
>
> The trial Judge erroneously treated the statement made to the complainant's mother in 2009 as a 'recent complaint' and consequently, wrongly directed the jury that her evidence regarding the complaint made to her '...may be given in evidence of the consistency of the conduct of the complainant which is evidence given at trial...' (page 33, lines 17-20).
>
> Ground 8
>
> The trial judge failed to direct the jury on how to treat and assess the Complainant's evidence with regards to his mental illness/capacity.

Ground 9

The learned trial Judge misdirected the jury on evidence/indictment preferred against the Appellant regarding the period on which the 'date unknown' of the offence happened and failed to require an amendment to the indictment to accord with the evidence.

Ground 10

The learned trial Judge, having failed to exclude prejudicial evidence being led that there was a 'first complaint' made to an unknown person which 'prompted' the Complainant to tell his mother what happened in 2009, omitted to tell the jury that they were not to act on that alleged complaint at all, thereby causing inadmissible, In appropriate and prejudicial evidence to be laid before the jury, adverse the Appellant's case."

Ground 6 The Trial Judge failed to give the appropriate identification directions to the jury

[21] Counsel Mr Samuels posited that the learned trial judge failed to give the appropriate identification directions to the jury, in light of the circumstances under which the alleged viewing of the accused occurred. Further, she failed to direct the jury as she had promised on how to treat with identification evidence. Counsel contended that her failure to do so left the jury without proper instructions as to how they ought to have dealt with this very important area of the law.

[22] Learned counsel reminded us that this court and the Privy Council have consistently emphasised the need for judges dealing with matters of identification to "give comprehensible warning as to the danger of a mistaken identification…In the absence of a clear warning, a conviction which was obtained on uncorroborated

identification evidence will not be sustained unless the circumstances were especially exceptional" (see **Conroy Prince v R** [2016] JMCA Crim 1 at para. [19]). Counsel relied on the case of **R v Turnbull and Others** [1976] 3 All ER 549; [1977] QB 224 (**Turnbull)**; the Privy Council case, **Reid and Others v R** (1989) 37 WIR 346, page 357; **Danny Walker v R** [2010] JMCA Crim 35 and **Langford (Leroy) and Freeman (Mwanga) v The State of Dominica** (2005) 66 WIR 194.. Counsel emphasised the importance of proper directions to the jury in cases of recognition. He placed reliance on Rowe J's dicta in **R v Oliver Whylie** (1977) 15 JLR 163 that:

> "A mistake is no less a mistake if it is made honestly. Although it is the experience of human beings that many honest people are quick to admit their mistakes as soon as they become aware of them, it is also possible that a perfectly honest witness who makes a positive identification might be mistaken and not be aware of his mistake."

[23] Counsel for the Crown Mrs Seymour-Johnson however contended that the judge's non-direction on identification made very little difference to the jury's evaluation of the case. She argued that the appellant's denial of the allegations did not mean that identification was being disputed. According to Mrs Seymour-Johnson, the appellant did not deny knowing the complainant.

Law/Analysis

[24] As submitted by Mr Samuels, in matters in which identification is an issue, it is incumbent upon the judge to warn the jury in a synoptic manner as to the dangers of mistaken identification. The fact that the parties were known to each other does not erase the possibility of a mistaken identification. Indeed, it is only in exceptional

circumstances that such a conviction will be allowed to stand if a clear warning is not given.

[25] Such a requirement was made plain by Lord Widgery CJ in his oft cited dicta in **Turnbull,** the *locus classicus* on the manner which a judge ought to deal with such evidence.

> "... First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to the mistaken, the judge should warn the jury of the special need to caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form or words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any

> specific weaknesses which had appeared in the identification evidence. **Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made**.
>
> All these matters go to the quality of the identification evidence. **If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger...**" (page 551) (Emphasis applied)

The learned judge's directions on identification

[26] The learned judge refreshed the jury's memory regarding the complainant's evidence as to his ability to view his assailant. She accurately highlighted his evidence as to the lighting condition and the length of time he claimed he was able to view the appellant. At page 16 she said:

> "Now, you may recall that the complainant, [FS], told you the circumstances under which he is able to say that it was [the appellant] who was in that room and touched him on his penis. And I will remind you now of the circumstances.
>
> [FS] told you that it was in the morning that he saw him, he first saw his hand and that he was right beside him, that there was light in the room and that he saw other parts of his body, his face, his penis, and that the light was in the ceiling, it was a kind of bulb he says, the long bulb, the white ones. The light -- said the light was outside, the sun -- **the sun was just rising it was in the morning**. He told you that the classroom had decorative blocks where breeze could come through. **He say [sic] that the sunlight maybe -- came through, maybe.** He said he saw the accused face. Nothing prevented him from seeing the accused face. When asked about how long you saw his face this was his answer:

> **'Well, the only time I took my eyes off [the appellant] was when I was getting off the sleeping bag and when he told me to go run.'**
>
> So how long you saw his face for. You don't have to give -- you can give us an estimate, a rough idea?
>
> 'Well, I wake up it never take about -- it was like a minute and 15 seconds I was looking at him so I estimate the time from mi wake up till mi reach to the door, so about a minute and some seconds.'
>
> I will give you directions in a while in relation to how you are to treat identification evidence." (Emphasis applied)

[27] The learned trial judge, however, did not keep her promise to direct the jury as to how they should have treated with the identification evidence. But does that omission alone render the conviction of the appellant conviction unsafe?

[28] As enunciated by Lord Ackner in the Privy Council case of **Reid and others v R** (1989) 37 WIR 346 at page 362:

> "If convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict. **It is only in the most exceptional circumstances that a conviction based on uncorroborated identification evidence will be sustained in the absence of such a warning.** This was not an exceptional case." (Emphasis applied)

Does this case fall into the exceptional category?

[29] By attending the camp the complainant had known the appellant for some time. This is therefore a case of recognition. Notwithstanding, it should have been pointed out to the jury that although it was the complainant's evidence that he saw the

appellant for a minute and 15 seconds (that is, from the time he awoke until he reached the door), he would not have been viewing the appellant's face for the entire minute and 15 seconds for the following reasons:

i) it was also his evidence that, when he awoke, the appellant, "...deh right behind a mi". He explained that he was sleeping on his side and he turned around and "hit away [the appellant's] hand".

ii) His ability to view his assailant's features from the point in time he awoke to the point of his departure, would also have been interrupted while he looked at other parts of the appellant's body including his hand and penis.

iii) His attention was also drawn to the sun rising out outside and its light which came through the blocks and to the pornographic tape which he said the appellant forced him to watch.

It was, however, also his evidence that they spoke to each other. According to him the appellant said:

" [R]elax and stop gwaan like a idiot"

[30] Sufficient words were uttered which could have enabled the complainant to recognise the appellant's voice in light of the length of time he had spent with him and thus bolster his visual identification. Although directions on recognition should have been given to the jury, the learned judge's failure, however, to give such directions,

cannot in light of the evidence, by itself, be fatal. The critical issue was that of credibility and the learned judge's treatment of that issue.

[31] It is convenient to deal with grounds 7 and 10 together.

Ground 7 **The trial judge erroneously treated the statement made to the complainant's mother in 2009 as a recent complaint and consequently, wrongly directed the jury that her evidence regarding the complaint made to her may be given in evidence of the consistency of the conduct of the complainant which is evidence given at trial (page 33, lines 17-20).**

Ground 10 **The learned trial Judge, having failed to exclude prejudicial evidence being led that there was a first complaint made to an unknown person which prompted the Complainant to tell his mother what happened in 2009, omitted to tell the jury that they were not to act on that alleged complaint at all, thereby causing inadmissible, in appropriate and prejudicial evidence to be laid before the jury, adverse the Appellant's case.**

Can the complainant's complaint to his mother be classified as recent?

[32] Although the Crown eventually conceded these two grounds, it is nevertheless helpful to comment on them. The complainant told his mother about the incident sometime during the summer of 2009, approximately three years after the alleged incident. At page 33, in directing on the issue of recent complaint, the learned judge said:

> "Now, Miss Findley's evidence is what you call in law, a recent complaint, and I am going to instruct you in relation to what the law says about recent complaint.
>
> The fact that a complaint was made at the first reasonable opportunity after the alleged offence, and the particulars of such complaint may be given in evidence of the consistency of the conduct of the complainant which is evidence given at

> the trial, such complaint cannot be regarded as corroboration of the story of the complainant.
>
> And you will remember, I instructed you or directed you in relation to what corroboration is, and I have already told you that there is no corroboration in this case."

[33] Both Mr Samuels and Crown Counsel agreed that for a statement to be admissible under the recent complaint exception, it must have been made "at the first opportunity after the offence which reasonably offers itself" Counsel Mr Samuels relied on the cases **R v Osbourne** [1905] 1 KB 551; **Peter Campbell v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 17/2006, judgment delivered 16 May 2008 and **R v Birks** [2003] 2 Cr App R 7.

Law/Analysis

[34] Evidence of a complaint made by a complainant who alleges to have been sexually violated is allowed into evidence for the sole purpose of demonstrating that the complainant has been consistent. Hawkins J's celebrated statement in **R v Lillyman** [1896] 2 QB 167 at page 170 has been relied on in this court and the English courts as the law:

> "**It clearly is not admissible as evidence of the facts complained of**: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. **The complaint can only be used as evidence of the consistency** of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains." (Emphasis applied)

[35] Roch LJ's statement in the English Court of Appeal case, **R v Valentine** [1996] 2 Cr App Rep 213, provides guidance in respect of complaints in sexual offences cases. He referred to:

> "The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. **What is the first reasonable opportunity will depend on the circumstances including the character of the complainant** and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, **a complaint will not be inadmissible merely because there has been an earlier complaint, provided that the complaint can fairly be said to have been made as speedily as could be reasonably be expected**. This is not to say that it is permissible to allow the Crown to lead evidence that the same complaint has been made by the complainant in substantially the same terms on several occasions soon after the alleged offence, where that would be prejudicial in that it might incline the jury to regard the contents of individual complaints as evidence of the truth of what they assert. **The complaint has to be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the complaint that was made in the terms in which it was made."** (Emphasis applied)

[36] In **R v Cummings** [1948] 1 All ER 551, a decision of English Court of Appeal, Lord Goddard CJ agreed with the trial judge that a complainant who had waited until the morning after she was assaulted to lodge her first complaint was not unreasonable in the circumstances of that case. At page 552, he stated:

> "**Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case.** There is no one

> else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that Hallet J did apply the right principle. He had clearly in mind the fact that there must be an early complaint. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the camp to a man she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mrs Watson, her friend, were matters that the learned judge had to take into account. **He did take them into account, and he came to the conclusion that in the circumstances the complaint next morning was in reasonable time. If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not what the prosecutrix did was reasonable, this Court cannot interfere."** (Emphasis applied)

[37] Four days were considered by this court as sufficiently recent in the case of **Peter Campbell v R** for a report to be "admitted and considered by the jury". However in **R v Birks** [2002] EWCA Crim 3091, one year was held to be too long a period to be considered a recent complaint. At paragraph 23 Rix LJ expressed the court's view thus:

> "... Nevertheless we feel that in the current state of the law we are unable to extend the test of a complaint being made in a reasonable time as far as Mr Quirke urges us to do so." The fact remains that the language that has been used (and which to some extent goes back to that citation *Hawkins' Pleas of the Crown* to be found in **Lillyman)** regarding **whether a complaint has been made in a reasonable time, have all been made against the background of times of delay which have been very short indeed, measuring only a matter of days and extending, so far as research goes, only to a week at the outside**. Moreover, it is well known that the doctrine with which we are concerned is referred to as the doctrine of recent

> complaint. **It is itself an exception to what might be called the even more significant doctrine that evidence of previous consistent statements**, whether of witnesses for the prosecution or, importantly, of witnesses for the defence and of the defendant himself, are not permitted. ..." (Emphasis applied)

[38] It cannot therefore be reasonably contended that three years after the alleged offence can be deemed short. But was there a valid reason the complaint was made so long after the alleged incident? The reason proffered by the complainant was that he was ashamed and never wanted his mother to know that "something like that really happened to [him]". He was also afraid that he might have had "to change school again". During those three years, the complainant would have had ample opportunity to complain to various persons about the alleged incident. In our view, three years is too inordinate a period to be considered recent. The judge therefore erred by directing the jury that it was a recent complaint.

The effect of the failure to exclude prejudicial evidence

[39] It is settled law that evidence of a complaint is inadmissible if the person to whom the complaint is made does not give evidence. See **Peter Campbell v R** which relied on **R v Gene Taylor** (Unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 132/1997, judgment delivered 18 December 1998 and **R v Leonard Fletcher** (Unreported), Court of Appeal, Jamaica, Criminal Appeal No 20/1996, judgment delivered 25 November 1996.

[40] The learned judge further fell into error by allowing into evidence prejudicial evidence that the complainant had complained to someone unknown and whose

encouragement prompted him to tell his mother about the incident. The complainant's evidence was therefore fortified by hearsay evidence.

[41] We agree with Mr Samuels that the judge therefore erred, not only by directing the jury that the complainant's complaint to his mother three years after the alleged incident was a recent complaint, but also by allowing into evidence what the appellant allegedly told someone who did not testify and whom the appellant was denied the opportunity of cross-examining. The learned judge made a further error in allowing his mother to testify as to what the complainant told her.

Ground 8 The trial judge failed to direct the jury on how to treat and assess the Complainant's evidence with regards to his mental illness/capacity.

[42] Counsel for the appellant contends that the evidence before the jury in respect of the mental state of the complainant required a careful warning from the trial judge and the absence of such a warning resulted in a miscarriage of justice. We agreed.

[43] In her summation, the judge commented on the mental state of the complainant but failed to give an appropriate direction. Not only did she fail to give proper directions, she also misdirected them by telling them that there was no evidence about his mental state.

Law/Analysis

[44] Mr Samuels referred the court to the House of Lords decision, **Spencer and Others v R** [1986] 3 WLR 348. At page 349 the House held:

> "[In] cases where the prosecution evidence was solely that of witnesses not in any of the accepted categories of suspect witnesses but who, by reason of their particular mental condition and criminal background, fulfilled analogous criteria, a trial judge was under a duty to make the jury fully aware of the dangers of convicting on such evidence."

[45] The complainant admitted under cross-examination that whilst he attended Oberlin High School ("Oberlin") he was in "bad company". He breached some of the school's rules and he smoked "weed". Whenever he smoked weed, it made him sleepy. The principal became aware of his behaviour and he was consequently asked to leave the school. He admitted that he was also charged before the court for the following offences:

i) possession of ganja, for which offence he paid a fine; and

ii) assault with intent to rob.

He was also admitted that he "beat up" his sister and caused her to remove from their home.

[46] It was his evidence that he did not smoke weed while he was at St Andrew Technical High School but he resumed after he left. Under cross examination, he testified that he received a ganja injection from the University Hospital of the West Indies for smoking weed and he also had an open appointment with the Duhaney Park Health Centre.

[47] It was also the complainant's mother's evidence that he was transferred to St Andrew Technical High School because he was asked to withdraw from Oberlin due to bad behaviour which included playing truant and smoking ganja.

[48] It is necessary to quote verbatim, the circumstances under which the complainant's mother was told of the incident. She said:

> "In 2009, ahm, [FS], I realize [FS] was at home, I realize he was acting a little strange, he was talking to his-self [sic] and I said to him what happen.
>
> ...
>
> He said he had something to tell me. I ask him what is it and he said, ahm, Mr Nichol-when he was at the football – when he was at the camp ..." (page 119)

[49] It was also her evidence that in 2009, she noticed that he was "nervous and soh". She further explained that:

> "He wasn't afraid; in 2009 when I recognize he was acting strange he was acting afraid, he was afraid and he even run away at the time when I realize that he was acting strange."

She further explained that before 2006 he was not "acting anyway strange ... he act normal".

[50] Of significance was her evidence that the day following her complaint to the principal, the complainant went to the mental hospital. Under cross-examination, she reluctantly agreed that in August 2009 she received a telephone call which caused her to go to the Bellevue Hospital where she saw the appellant.

[51] It was also her evidence that the appellant had been treated at the (mental hospital) Bellevue Hospital as an outpatient and had also been hospitalized there on a number of occasions. Directions on the complainant's mental state at the time he complained to his mother were critical, especially in light of the evidence that the complainant's mental condition began in 2008 and importantly, in 2009 when he complained to his mother he had been acting strangely.

Dr Yvonne Bailey-Davidson's evidence

[52] Dr Yvonne Bailey-Davidson, a psychiatrist, provided expert evidence on behalf of the defence as to the complainant's mental state. It was Dr Bailey-Davidson's evidence that she first saw the complainant in 2011 at the Bellevue Hospital where he was admitted and where it was indicated that he was diagnosed with bipolar disorder. It was also her evidence that the complainant was physically aggressive towards family. The complainant was also diagnosed with depression at the University Hospital.

[53] She was unable, however, to state whether the complainant was suffering from bipolar disorder in 2006. She testified that in 2010 he was seen at Bellevue Hospital and diagnosed with mania and substance abuse. He was admitted to the Bellevue Hospital several times. She saw the complainant again in 2011 and 2013. Upon his discharge in 2013, he was normal and was no longer on medication.

[54] It was also her evidence that persons suffering from bipolar disorder often have significant delusions which she explained as "a fixed false belief". Such delusions are

often sexual. The complainant had "many frequent manic episodes". Indeed it was also her evidence that he had an open appointment at the Duhaney Park Medical Centre.

The judge's treatment of the complainant's mental illness

[55] In directing the jury on this issue, the trial judge regurgitated most of the doctor's evidence. She however did not direct their attention to her evidence that persons suffering from bipolar disorder can be delusional. Nor did she, in her recitation of the doctor's evidence, speak to her evidence that such delusion can include sexual delusions. She instead sought to downplay that vital aspect of her evidence. She in fact misstated the doctor's evidence by telling them that:

> "[T]here is no evidence to suggest either way, whether he [the complainant] was normal or abnormal, so I am going to ask you not to speculate about that point. There is no such evidence before you. She [the psychiatrist] says that the complainant has had manic episodes, and so he is unable to recall the past accurately." (page 41)

[56] His history of violence to his sibling and addiction to ganja were important considerations especially in light of the fact that the complaint coincided with his "strange behaviour". Careful directions to the jury as to his mental condition were crucial. Instead, the judge deflected the jury's mind from that critical aspect of the evidence by directing them not to consider it, although Mr Pearson, counsel who appeared for the defence, directed her attention as the necessity of such directions.

[57] At pages 64 and 65 of the transcript counsel for the appellant sought to assist the judge.

> "My assessment, however, m'Lady, is that there is another category of persons where there is a danger to convict and it is where the prosecution evidence relies solely, and there is no corroboration, relies solely upon evidence of a person who has the mental condition that [FS] has and the direction maybe given that it is also dangerous to convict in those circumstances m'Lady."

[58] Indeed, as contended by Mr Samuels, the learned judge's failure to give the appropriate warning as to FS's mental condition and her erroneous direction concerning the lack of evidence as to his mental condition amounted to a withdrawal of that defence from the jury. Proper directions to the jury were vital, especially in light of the absence of evidence corroborating the complainant who was at the material time suffering from bipolar disorder and mania. In our view, this ground also succeeds.

[59] It is unnecessary to deal with ground 9, as grounds 6, 7, 8 and 10 are sufficient to dispose of the matter.

Disposal

[60] The forgoing compelled us the decision stated at paragraph [2].