

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 59, 70 AND 71 OF 1996

**BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.**

REGINA

VS.

KEITH ROBINSON

AINSLEY ROCHESTER

GEORGE SWIRE

Robinson unrepresented

Robin Smith for Applicant Rochester

Delroy Chuck for Applicant Swire

***Kent Pantry QC, Miss Lisa Palmer and
Miss Marlene Malahoo for the Crown***

March 4, 5 and July 14, 1997

RATTRAY P.:

On the night of the 16th December 1993 J. L. a domestic worker 22 years of age who had just been dismissed from her job at Up Park Camp, came to East Queen Street, Kingston with the intention of taking a bus to Portland. She

awaited the transportation near by the Central Police Station which is situated on East Queen Street. When no bus arrived she spoke to a lady who gave her some advice. Consequently, she went into the Police Station and spoke to a guard concerning her plight. She was sent to the guardroom where she sat on a bench. It was between 7:30 - 8:30 p.m. While there she saw the applicant Keith Robinson, a police officer, who told her that she could not remain in the guardroom. This applicant is not represented and no proper grounds of appeal have been filed on his behalf.

Robinson left her, spoke apparently to the station guard and then took her to a room upstairs which had a bed and a table. She rested on the bed. She alleges that Robinson held her down and had sexual intercourse with her without her consent. She resisted and fought him off but in vain. Then, according to J. L. the applicant Ainsley Rochester, another policeman came into the room. Robinson held her down and Rochester proceeded to have sexual intercourse with her also without her consent. She left the room and went downstairs where she saw the applicant George Swire who is a Police Sergeant. She reported the matter to him. He took her to a little office downstairs near to the guardroom and wrote in a book. He then said he wanted to have sex with her. He lifted up her skirt, turned her backways and pushed his penis into her bottom. She began to bleed from her bottom. She gave an opinion in evidence that "it seems that it miss." The judge in his summing-up interpreted her to be meaning "that instead of going in the vagina it went into her anus".

She went back to the guardroom and told some policemen what had happened. She was taken to the Rape Unit by a policewoman and examined by a medical doctor at about 2:00 a.m. on the 17th of December.

A Dr. Leon gave evidence that on the 21st December J. L. was brought to his surgery where he inspected her and found a linear abrasion of the partition wall of the anus. The injury could have been caused by an erect penis. He gave his opinion that the abrasion was less than three days old. This opinion however was qualified by his evidence that "some people heal early but some are not early healers."

It appears to us clear that if her evidence is to be believed on this point the doctor who examined her when she went to the Rape Unit on the early morning of the 17th December was not Dr. Leon. On his evidence he examined her on the early morning of December 21.

She had known the applicant Robinson for about a year before the incident took place. He had worked at Kings House at a time when her boyfriend was working as a soldier there. She stayed over at Central Police Station for a number of days and pointed out Robinson first and later on the applicant Rochester.

Constable Delroy Johnson gave evidence of being on sentry duty at the Central Police Station on the night in question. The complainant had spoken to him and he sent her to the guardroom. He said that he saw her at about 8:30 - 9:00 p.m. sitting there. About 11:00 p.m. while still on sentry duty he saw her again. Her hair appeared to be ruffled. She told him that two police officers had had sex with her, one of them being Constable Robinson. He sent her to the guardroom. She had given a broken chain to him and asked him to have it mended. He had not seen either Constable Robinson or Constable Rochester that night. He had however seen Sergeant Swire "at the front". On cross-examination this witness said:

"I asked her - the complainant never told me that she was raped - I asked her if she had been raped and she answered, she gave them."

Questioned by the trial judge as to why then was he sending her to the guardroom, if it was to go and tell the station guard that she gave the two police officers? His reply was:

"No, no, I wasn't telling her to do that, I was just sending her to the guardroom."

On re-examination he said:

"I asked her if she had given them ... I never asked if she was raped."

It is clear that the jury rejected the evidence of this witness that he was told by the complainant that she had voluntarily given sex to the two policemen.

Inspector Amos the Divisional Inspector attached to the Central Police Station gave evidence of seeing the complainant at the station on the 20th of December and receiving a complaint from her of having been raped by the two policemen whom she described. She told him of how her chain was broken during the assault. She pointed out Constable Johnson on sentry duty as a policeman to whom she had spoken. Inspector Amos called in Constable Johnson and in his presence she repeated how she had spoken to him and given her chain to him to be mended. The Inspector recovered the chain from the Constable. She reported how a Sergeant, described by her as "tall, brown and has pretty hair", had taken her to a room, which she pointed out and had sexually assaulted her in her anus while wearing a condom. Inspector Amos recognised the room which she pointed out as the one occupied by Sergeant Swire. She took Inspector Amos and pointed out also the room in which she

said the two policemen had raped her. Inspector Amos recognised this as the room at that time occupied by Constable Robinson and Constable Rochester.

Inspector Amos spoke to Sergeant Swire informing him of her complaint. He denied having assaulted her but admitted that he had invited her to his cubicle and given her \$30 because she said she was hungry.

Inspector Amos next spoke to Constable Rochester who said he had sexual intercourse with the complainant but that she had agreed to it.

He next spoke to Constable Robinson who also said he had sexual intercourse with the complainant but that she had agreed to it.

Detective Inspector Cole gave evidence of Inspector Amos speaking with him on the 21st December as a result of which the complainant was brought to him by Inspector Amos. She made a report to him alleging that the two police officers had sex with her without her consent. She reported also that Sergeant Swire that night had sex with her in her bottom. She said she stayed in his cubicle and he gave her \$30.00 and sent her out.

Detective Inspector Cole recorded a statement from her and arranged for her to be medically examined in the police surgery. After she returned from the surgery the complainant along with Inspector Amos showed him around the compound and the complainant pointed out every room into which she had gone to that night. In each room in the barracks there is a black box which bears the name of the occupant. She took him to a room in which this black box recorded the name of Constable Robinson and also to a room which he knew was occupied by Sergeant Swire.

Detective Inspector Cole sent for Sergeant Swire and asked her in his presence if she knew him and the complainant replied that "is him sex her off in her bottom". To which the Sergeant used these words:

"Who tell you to report the matter?"

And she responded that she was not going to report it but she thought Inspector Amos was going to lock her up.

When charged by Detective Inspector Cole and told by him that the young lady had reported a case of buggery committed in the cubicle occupied by him in which he was a suspect Sergeant Swire said:

"Mi carry de girl go there and mi buy food and give her but I did not have any sex with her."

Mr. Robin Smith counsel for the applicant Rochester submitted on his behalf that the directions of the learned trial judge on identification were inadequate and that the jury should have been directed on the necessity for an identification parade. This complaint is not supported by the summing-up of the learned trial judge. He gave the **Turnbull** directions on identification evidence and he further pointed out to the jury as follows:

"In the case of the accused man, Rochester, the complainant's evidence is that some day or days after the incident, she was at the station and she saw him, and she saw the other man and she pointed them out: 'These are the two men who did it.' And when the officer, the Inspector, called in Mr. Rochester and asked him about the case, according to his evidence, Mr. Rochester had acknowledged that he had sexual intercourse with the girl. So where is the necessity for any identification parade? None. According to the evidence of this Inspector, is that he admitted having sexual intercourse with her. So where would be the I.D. Parade. What would it be for."

In our view the evidence of the complainant and the admission of the applicant Rochester to Inspector Amos that he had sexual intercourse with the complainant, albeit with her consent, disposes of the identification issue as to Rochester, and the learned trial judge's summing-up on identification cannot be faulted.

Mr. Delroy Chuck on behalf of the applicant Swire submitted that:

"There is no compelling evidence that the applicant intended the actus reus of buggery."

The applicant Swire had been charged also with rape but this was withdrawn by the trial judge from the jury. According to Detective Inspector Cole the investigating officer, the complainant after telling him that Swire had sex with her said:

"It was voluntary and that during that time he started having sex with her in her bottom and she started fighting and crying and he stopped."

The doctor's evidence established the injury to her anus. Sergeant Swire in his unsworn statement told the Court that he never had sex with her. He had also told Detective Inspector Cole:

"Mi carry de girl go there and mi buy food and give her but I did not have sex with her."

The defence therefore of Sergeant Swire was not one of mistake in relation to the entry into her anus but that he had no sex with her at all.

Mr. Chuck submitted that the complainant's comment "It seems like it miss" required the learned trial judge to give to the jury a direction on the effect of mistake on the offence of buggery. In his unsworn statement Sergeant Swire told the jury that he saw the complainant at the gate the night in

question. She was sent away because he was having a discussion there with other policemen. He left the area and:

"I did not return to the Station until the following morning. At no time did I have sex with this lady in her bottom. At no time did I have sex with her at all in any fashion."

He denied having said to Inspector Amos and Detective Inspector Cole that he gave her money to buy food.

With respect to the offence of buggery the learned trial judge stated in dealing with the established law that consent is no defence to buggery:

"... it is an absolute offence, so there is no defence in this one. All you have to be satisfied with in this one is that the male organ penetrated into the anus of the complainant, nothing more necessary, no emission of seed, no nothing like that."

Here the learned trial judge was pointing out the difference in the law between rape and buggery.

Was there a duty on the learned trial judge, as Mr. Chuck submitted, to tell the jury that if they believed that in the sexual act Sergeant Swire mistakenly put his penis in her anus instead of her vagina, the buggery was not intended and he would not be guilty of that offence?

Mr. Chuck produced no authority on which he could find support for his submission in this regard. If mistake indeed it was, this allegation should have come from Sergeant Swire. He gave no such evidence. The words of the complainant "it seems like it miss" cannot in my view be elevated to the level of evidence which could destroy the mental element necessary in the commission of a criminal offence. If a mistake was made it would be in the knowledge of Sergeant Swire rather than in the knowledge of the person violated.

Mr. Chuck also submits that in respect of Swire the complaints to Inspector Amos and Detective Inspector Cole did not qualify as recent complaints.

The question of the freshness of the complaint in respect of its admissibility in evidence must depend upon the peculiar circumstances of each case. After being violated by Robinson and Rochester the complainant said that she went downstairs. Constable Johnson told the Court that she told him then that two police officers had sex with her and gave him her broken chain to be mended. However, in cross-examination he said that she admitted consenting to sex. This as we have pointed out was obviously rejected by the jury. She saw Sergeant Swire that very night and complained to him. His response to the complaint was to take her to his office and violate her as well. On the 20th of December she complained to Inspector Amos. Then she finally made a report to the investigating officer on the 21st of December as a consequence of which Detective Inspector Cole sent for Sergeant Swire. The complainant was in his office. We have already referred to the evidence of Detective Inspector Cole in this regard.

In *R. v. Henry Hedges* [1910] 3 Cr. App. Rep. 262 the complaint was made eight days after the alleged offence and Phillimore J in his judgment stated:

"The complaint, the doctor's evidence, and the prisoner's denials in cross-examination, and, finally, the statement he made when arrested, are all facts that the jury were entitled to take into consideration as being to some degree corroboration of the girl's story."

In our view the complaints made in the circumstances of this case four days after the commission of the offences by the applicants were still recent enough to be admitted and considered by the jury.

The applications for leave to appeal are therefore refused. In respect of Rochester and Swire their sentences are to commence on the 26th August 1996. In respect of Robinson his sentence commences 13th July 1996.