JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No.49/1972

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.

CYNTHIA WALSH)
CLAUDE CHUNG) v. REGINA

Velma Hylton for the Crown.

Ian Ramsay for Appellants.

7th and 8th February and
13th April, 1973

HERCULES J.A:

On 8th February, 1973, we dismissed this appeal and indicated that we would put our reasons in writing. This we now do.

At the outset, Mr. Ramsay conceded that the appeal of Cynthia Walsh had not been perfected by reason of a failure to file grounds. In her turn Miss Hylton also adverted to the position of Walsh and submitted that both appeals stood or fell together. In view however of the conclusion arrived at these reasons relate only to the appeal of Claude Chung.

The Appellant was convicted by the Resident Magistrate, St. Andrew, Mrs. Elouise Sinclair, of offences under Section 2 (a) (b) and (c) of The Obscene Publications (Suppression Of) Law, Chapter 267 of the Revised Laws of Jamaica.

Under Section 2(a) he was charged with having by way of trade in his possession at Readers' Book Shop 134, Old Hope Road, certain obscene printed matters namely 2 books entitled "Virgin Sex" and "Stag Film Nymph". For this he was fined $40.00 or 30 days hard labour.

Under Section 2 (b) he was charged with by way of trade putting the said books into circulation. For this he was admonished and discharged.

Under Section 2 (c) there were two informations charging:

(1) that he carried on the business which was concerned with the public exhibition of the said books. For this he was admonished and discharged

and

(2) that he took part in the business concerned with the public exhibition of the said books. For this he was again admonished and discharged.

The evidence of the Complainant, Sgt. Clarence McKay, was not in dispute. On 18th July, 1970, he went into Readers' Bookshop, 134 Old Hope Road, St. Andrew, and bought the two books. He said that he would not like to read them again. At page 12 of the record the learned Resident Magistrate expressed the view that the Court was entitled to read the books and that the Court had in fact done so. Obviously the Court considered the books obscene.

Mr. Ramsay argued two grounds of appeal. The first was

> "That the Crown failed to lead any evidence so as to establish a prima facie case upon the charges.
>
> Alternatively that the Court cannot of its own knowledge take judicial notice of "obscenity" whatever that may mean - for example by a reading of the Exhibit Book; no more than a Court could decide that a gun is a gun in a legal sense by an examination of the Exhibit gun."

In support of this ground Mr. Ramsay submitted that no evidence was led as to the nature or quality of the books from which a jury would draw an inference of obscenity and that a cross section of the community should have been called.

Section 2 of the Obscene Publications (Suppression Of) Law provides for a penalty upon summary conviction before a Resident Magistrate. In that situation the Resident Magistrate functions as judge and jury and there is abundant authority for the learned Resident Magistrate's statement that the Court was entitled to read the books. In the case of R. v. Reiter, (1954) 1 All E.R., at page 742/3 Lord Goddard C.J. cited with approval a passage from the leading judgment in the Scottish case of Galletly v. Laird, M'Gown v. Robertson, 1953 S.C.(J) 16 in which matters relating to obscene literature were discussed. In giving the leading judgment the Lord Justice - General (Lord Cooper) said (1953 S.C.(J) 26: " ..... I am not dismayed by the idea that the opinion of the magistrate before whom the case is brought is virtually determinative of the question whether the books or pictures libelled are or are not indecent or obscene. Once it is understood that the emphasis falls to be laid upon the second of the elements defined above, it seems to me to be not only intelligible but inevitable that the character of the offending books or pictures should be ascertained by the only method by

which such a fact can be ascertained, viz: by reading the books or looking at the pictures. The book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities; and if in any case the magistrate's decision is challenged, the only method by which an appellate tribunal could determine whether the magistrate was entitled to reach the conclusion which he did would be by examining the book or picture, not with a view to retrying the case but solely with a view to discovering whether they revealed evidence on which a reasonable magistrate would be entitled to condemn them as indecent or obscene."

In the later case of Thomson v. Chain Libraries Ltd. (1954) 2 All E.R. 616, Lord Goddard C.J. stated at pages 617/8:

"The only way in which they (referring to the justices) can be satisfied that books are obscene is by reading them and looking at them. It does not require evidence to satisfy the justices whether or not they are obscene. The justices must look at them for themselves."

The same principle was followed by Lord Parker C.J. in John Calder (Publications) Ltd. v. Powell, (1965) 1 All E.R. 159. At page 162 Lord Parker said: "..... I cannot accept Counsel's contention that the justices cannot look at the book themselves." In the light of these authorities we did not think there was any merit in the first ground.

Mr. Ramsay's second ground was: "That the Statute under which the said charges were laid is bad for vagueness and want of particularity in that it contains no definition of "obscene", or of the concept of obscenity for the purposes of the Statute. Alternatively, assuming (which is not admitted) that a Common Law definition of "obscenity" could be imported within the Statute, then the Crown led no evidence to satisfy, as a matter of proof, the ingredients thereof."

On this ground the submission was that there must be a definition section as is provided by Section 1(1) of the Obscene Publications Act, 1959, as amended by the Obscene Publications Act, 1964, in England. In the absence of such a definition the jury must say what it is. Therefore, he contended, the Jamaican statute was bad and inoperable today and the Court was not entitled to import a common law definition.

In the Oxford dictionary, obscene is defined as "repulsive, filthy, loathsome, indecent, lewd". The classic common law definition was laid down by Cockburn C.J. in R. v. Hicklin (1868) L.R. 3 Q.B. 368. At page 371 Cockburn C.J. declared:

" ..... the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." This was substantially adopted in the definition provided by Section 1 (1) of the English Obscene Publications Act, 1959.

Mr. Ramsay's submission appeared untenable that the Jamaican statute was bad and that the common law definition could not be imported. For one thing the statute has to be administered by the Courts as it is. Moreover, as Miss Hylton submitted, when it was enacted in 1927 the Legislature must be presumed to have recognised the existence of the common law definition laid down by Cockburn C.J. in R. v. Hicklin (supra).

In the case of John David Stamford (1972) 56 Cr. App. R. 398 the Appellant was convicted at Brighton Quarter Sessions on March 30, 1971, of five offences of sending an indecent article by post, contrary to s. 11 (1) (b) of the Post Office Act, 1953. In that Act there is no express definition of indecency or obscenity as there is in the Obscene Publications Act, 1959. The English Court of Appeal in Stamford's case (supra) held that notwithstanding the absence of an express definition the question of what is obscene is solely one for the jury.

In the case under review we could not accept the submission that the Jamaican statute is bad for want of particularity. In our view the ordinary meaning and the common law definition of obscene make the statute absolutely operable and this was obviously the expectation of the Legislature of 1927. The statute made the offences triable summarily by the Resident Magistrate and she functioned thereby as judge and jury. There is abundant authority cited above that she could read the books. This is what she did and we found the second ground argued also lacking in merit. Therefore we dismissed the appeal.