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RM, SEM 25/3

SET-6

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T. No.45/93

NAME AND ALL IDENTIFYING
PARTICULARS SUPPRESSED

249



~~R E G I N A~~

R

v.

Accused (T 45/93)

~~R (T. 45/93)~~



Hearing: 11 March 1994

Counsel: B.M. Stanaway & Miss C.E. Clark for Crown
D.J. Boyle & M.J. Callaghan for Accused

Judgment: 11 March 1994

Reasons for Judgment: 15 MARCH 1994

REASONS FOR JUDGMENT OF TIPPING, J.

Introduction

These are my reasons for declaring admissible the proposed evidence of Dr Karen Zelas. The Accused is charged with sexual offences said to have been committed on his two daughters between 1983 and 1990. The elder daughter, who is now aged 21, had no recollection of the abuse alleged prior to July 1990. During the course of a counselling programme her memory of the alleged abuse started coming out. The younger daughter, who is now aged 18, had her first recollection of the alleged abuse in July or August 1991. The case therefore involves what is sometimes described as recovered memory. The Crown wishes to call evidence from Dr Karen Zelas, an experienced consultant psychiatrist practising in Christchurch. She has

training in child psychiatry. Annexed to the application for an order determining the admissibility of the proposed evidence was a brief of that evidence.

Summary of Evidence in Dispute

In summary it is proposed that Dr Zelas will describe the process by which human memories are formed. She will then describe how memories are retrieved. Retrieval occurs either as a deliberate cognitive process or as a response to associations or triggers. Dr Zelas will say that memories are not retrieved in their entirety but tend to be recovered piecemeal or "re-constructed" from stored material. It is therefore possible for memories to be influenced by other information held by the brain in storage. It is then intended that Dr Zelas describe the characteristics of memory and, in particular, memory of childhood events.

She will discuss what she describes as "declarative" or "semantic" memory and "somatosensory" memory and distinguish between the two. Declarative memory relates mainly to the storage and retrieval of material such as formal educational data. It is in this area that most studies of memory have been conducted. Somatosensory memory is the memory of the perception or experience of an event. By contrast to declarative/semantic memory, somatosensory memory is not retrieved in words but as a repetition of the original experience such as, for example, the feeling of a bodily sensation. This type of memory is likely to be triggered by the occurrence of an event which reminds the person of or has characteristics in common with the event which is remembered.

Dr Zelas will then go on to describe how the mind constructs psychological defences against trauma. These defences are classified as dissociation and denial. Dissociation involves shutting one's self off from the traumatic experience. Denial involves not acknowledging or allowing one's self to "know" the event or its significance. Dr Zelas says that because of

these mechanisms there may be partial or complete amnesia of traumatic events for at least periods of most victims' lives. This applies particularly when the events occur early in life. The experience is commoner with events registered by somatosensory memory as opposed to declarative/semantic memory.

Dr Zelas will discuss the concept of repressed memories and suggest that the term "repressed" is misleading and unhelpful because the so-called repression is not repression in any active sense, but as a result of dissociation and denial. Dr Zelas then discusses what is sometimes described as "false memory syndrome". She describes what sort of circumstances can provide a trigger for the retrieval of a memory that has been the subject of dissociation or denial.

Submissions

Mr Stanaway for the Crown submitted that the proposed evidence was admissible on two broad bases. First it would give the jury relevant information in a complex field well outside the ordinary run of human experience. Second it was suggested that the evidence would overcome the risk that the jury might be influenced by recent undisciplined and unbalanced treatments of the subject by various organs of the news media. For the defence Mr Boyle submitted first that the evidence was not relevant and second that there was a major danger that the evidence would be seen by the jury as an unjustified prop to the credibility of the complainants. In support of that point Mr Boyle submitted that instead of the case being judged by the experience of twelve jurors, as is customary, their consideration of the case would be unjustifiably affected by the views to be expressed by Dr Zelas.

Relevance?

The first question to be considered on any admissibility problem is whether the proposed evidence is relevant. Evidence must, of course, be

relevant to an issue at trial before it can be admissible. I do not accept Mr Boyle's submission that Dr Zelas' evidence is irrelevant. The central issue at the trial will be whether the complainants' evidence is credible. The concept of credibility has two aspects; first truthfulness and second reliability. It is the reliability aspect which will be particularly important in the present case. It may well be said for the defence that while the complainants honestly believe what they are saying their evidence is unreliable.

In any ordinary situation a jury might consider that if a complainant has had no recollection of an event for a number of years and then starts to recall it there could be a doubt about the reliability of the ultimate recall. The Crown wishes to put before the jury Dr Zelas' evidence to demonstrate that what, on its face, might appear strange is in medical or psychiatric terms quite possible. Dr Zelas' evidence is therefore directly relevant to the question of the reliability of the complainants' evidence. In one sense such evidence might be regarded as collateral but in the present case, in view of the unusual facts, I do not think it right to take the view that the evidence is legally irrelevant by reason of being collateral.

Expert Evidence

As the proposed evidence is relevant the next question is whether the subject matter is a proper one for expert evidence. Counsel mentioned the decision of the English Court of Criminal Appeal in R v. Turner [1975] Q.B. 834. I summarised what I saw as the essential contrast deriving from the judgment of Lawton, L.J. in that case in Police v. Sinclair [1991] 3 N.Z.L.R. 569, 576. The distinction is between matters of "ordinary human experience" upon which expert evidence is neither necessary nor admissible and "matters likely to be outside the experience and knowledge of a Judge or jury" upon which expert evidence is both necessary and admissible.

The approach in Turner has been adopted in our Court of Appeal: see Moore [1982] 1 N.Z.L.R. 242, 245. One of the cases cited by

Cooke, J. delivering the judgment of the Court in that case was the Canadian case of Helpard (1979) 10 CR (3d) 76. This concerned an accused who was 31 years of age but who had an IQ of 69 or 72 and was therefore said to be likely to react like an eleven old year child. That was said to be an assessment outside the experience and knowledge of a Judge or jury justifying expert testimony. The subject matter of Dr Zelas' evidence is, in my judgment, undoubtedly well outside the experience and knowledge of a jury. The subject matter therefore qualifies for expert testimony. The next question is whether the proposed evidence is to be given by someone who is qualified as an expert within the field in question. As Mr Boyle acknowledged, there can be no doubt about that.

Usurpation of Jury Function/Prejudice

The fourth point comes close to the heart of Mr Boyle's objection. It is whether the proposed evidence usurps the function of the jury. Mr Boyle put it this way; that there is a danger that the jury will think Dr Zelas is endorsing the reliability of the evidence of the complainants. It should be noted, however, that the proposed evidence carefully does not trespass into the specifics of the present case at all. It is not intended to do so, nor does it have that effect. It is designed simply to give the jury a scientific appraisal of how human memory works and of the capacity for memory to be affected by dissociation and denial.

At one point in his submissions Mr Boyle described Dr Zelas' evidence as an academic treatise. That proposition was advanced in support of the argument that the evidence was not relevant. I did not regard it as persuasive on that point. However, for the purposes of the present point, the very fact that it is in the nature of an academic treatise reinforces the point that Dr Zelas is not being called to present "a cleverly packaged endorsement of the complainant's truthfulness", as Williamson, J. put it in R v. CS Greymouth Registry T.6/93 (judgment 3/11/93).

Obviously the Crown is calling Dr Zelas in order to lay an appropriate foundation for the proposition that it is possible for memories to be recovered years after the event. That is a point requiring expert assistance. Whether this is what has happened on this occasion and whether the memories so recovered are reliable, is for the jury and not for Dr Zelas. She does not purport to be giving a view about that. She is simply supplying the jury with information outside their experience designed to help them in coming to the ultimate decision as to whether the complainants are truthful and reliable witnesses.

Cases such as R v. B [1987] 1 N.Z.L.R. 36 and R v. Accused [1989] 1 N.Z.L.R. 714, both decisions of the Court of Appeal to which Mr Boyle referred, do not really touch on the present point. In the former the Court of Appeal gave a ruling which led to the enactment of s.23G of the Evidence Act. The latter case was concerned with psychologists giving evidence about whether certain behavioural traits are consistent with sexual abuse of children.

I think the jury, with assistance from counsel and the trial Judge (in this case myself), will be capable of understanding the basis upon which Dr Zelas is put before them. They will, I am sure, be able to understand that Dr Zelas is neither directly nor indirectly intending to endorse the reliability of these particular complainants. Whether they are reliable is for the jury. Dr Zelas will simply tell the jury, according to her perception of the subject matter, that what the complainants assert as to their recovered memories is capable of occurring. In summary I am of the view that the proposed evidence does not, when carefully analysed, trespass improperly upon the ultimate issue to be decided by the jury. As Williamson, J. neatly said in R v. CS (supra): "A psychologist's opinion [here evidence] in a sexual abuse case may be a help to a jury or it may be an unjustified intrusion into their

decision making". In this case it is the former and thus the Crown has cleared this possible barrier to admissibility.

The fifth point, which is in some respects allied to the fourth, is the proposition that the danger of prejudice to the Accused outweighs the true probative force of this evidence. The proper probative force of the evidence is that it will give the jury assistance in a field which I have already indicated justifies expert assistance. I expressly reject Mr Boyle's submission that in this case the jury is capable of deciding and should be expected to decide upon the reliability of the complainants' evidence without the sort of expert help available from Dr Zelas.

While the Accused is of course entitled to a fair trial, so are the Crown and the complainants. Without Dr Zelas' evidence about the workings of human memory the jury would be deciding this case to a material extent in the dark. There is no justification for depriving them of appropriate light. Of course the Accused will be entitled to cross-examine Dr Zelas and, if he wishes, to call rebuttal evidence of his own. Mr Boyle suggested that if this were to happen the jury might well become highly confused. I doubt that will happen and in any event juries are from time to time required to assess medical evidence of some complexity in cases involving insanity. I consider that the assistance which the jury are likely to receive from Dr Zelas' evidence substantially outweighs any danger that the jury might misconstrue the purpose or ambit of that evidence in a way prejudicial to the Accused.

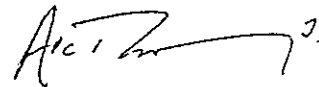
Summary

In summary my decision to declare admissible Dr Zelas' evidence was reached in this way. The evidence is relevant to a central, if not the central, issue, i.e. the reliability of the complainants' evidence. It deals with subject matter well outside ordinary human experience. It is clearly within the expertise of the proposed witness. It is neutrally expressed

and does not trespass improperly into the ultimate issue which the jury must decide, i.e. the reliability of these particular complainants.

Finally the probative force, in the sense of the assistance to the jury of the evidence, significantly outweighs any illegitimate prejudice to the Accused likely to ensue from its admission. I say illegitimate prejudice because, of course, in a sense the evidence is prejudicial to the Accused, as is any evidence which the Crown suggests is probative in some way of the Accused's guilt. Illegitimate prejudice arises when the evidence is based on or leads to a process of reasoning not properly open to the jury.

I have not found it necessary to traverse all the cases which counsel helpfully cited. In view of my conclusion on the first aspect of the Crown's case neither have I found it necessary to consider the Crown's point which relied upon previous media attention to the general subject matter of Dr Zelas' evidence.

A handwritten signature in black ink, appearing to read "Alicia Zelas".