Neutral Citation No. [2010] NICA 22 | *Ref:* **COG7495**

Judgment: approved by the Court for handing down | *Delivered:* **28/05/10**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

DPMC

and

DJW

Before Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ

The application to admit fresh evidence

[1] Both appellants sought to admit the evidence of Professor Martin Conway, Professor of Psychology at the University of Leeds, as an expert in Autobiographical Memory. Professor Conway has been engaged in research relating to human memory for approximately 25 years and he provided a report for the purpose of these appeals dated 6 July 2008. Sections 5 and 6 of his report took the form of a memory guide containing guidelines for evaluating the likelihood that accounts of childhood memories are based on experienced events and Section 7 contained his observations in relation to the specific complaints of the injured parties alleging sexual abuse by the appellants. Professor Conway has acted as an expert witness in a number of cases involving remembered childhood sexual and physical abuse and his evidence has been the subject of detailed consideration by the Court of Appeal Criminal Division in England and Wales in R v JH and TG (Deceased) [2005] EWCA Crim 1828, R v Jonathan CWS and Malcolm W [2006] EWCA Crim 1404 and R v Bowman [2006] EWCA Crim. 417. The court received Professor Conway's report and heard his oral evidence *de bene esse* for the purpose of determining the application to admit fresh evidence.

[2] The court also received a report from and heard the evidence of Professor C R Brewin. Once again the court did so *de bene esse*. Professor Brewin is a Chartered Clinical Psychologist and a Fellow of the British Psychological Society who was a member of the British Psychological Society's Working Party on Recovered Memories of Trauma. He has a particular interest in memory processes in Post Traumatic Stress Disorder (PTSD).

[3] The main points adumbrated by Professor Conway in the Memory Guide section of his report and in his evidence were:

- *Because human memory is often highly inaccurate, the truth content of a memory cannot be reliably established without independent evidence.*
- *Memories of traumatic experiences have distinctive features;*
- *Memories of early childhood experiences are subject to age-based amnesia and also have their own distinctive features.*

[4] Professor Conway recommended the following rules of thumb when dealing with adult witnesses purporting to recall events experienced before about 7 years of age;

- *Detailed and well organised memories dating to events that occurred between 7 to 5 years of age should be viewed with caution;*
- *Detailed and well organised memories dating to events that occurred between 5 to 3 years of age should viewed with considerable caution;*
- *All memories dating to the age of 3 years and below should be viewed with great caution and should not be accepted as memories without independent corroborating evidence.*

[5] He emphasised the need to distinguish between the "mental representation of a memory" and the public account or verbal narrative of a memory, the latter being the rememberer's attempt to present the account in a fluent and coherent form. In his opinion adult claims to be able to describe childhood memories in a detailed and coherent account should be regarded as "unusual" and he noted two important sources of "presentational exaggeration" as being the police interviewer in which the police officer seeks to elicit a statement recording a coherent narrative and the conscious or unconscious embellishment with detail by the interviewee who desires to be believed. The danger of such detailed flowing narratives is that they give rise to an effect known as "trivial persuasion" in so far as the inclusion of highly specific detail tends to raise the perceived credibility of the witness.

The Statutory Framework

[6] Section 25 of the Criminal Appeal (Northern Ireland) Act 1980 provides as follows:

"(1) For the purposes of an appeal under this part of this Act the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice –

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the court necessary for the determination of the case;

(b) order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not he was called at the trial; and

(c) receive any evidence which was not adduced at the trial.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –

(a) whether the evidence appears to be capable of belief;

(b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[7] In R v Walsh [2007] NICA 4 Kerr LCJ, delivering the judgment of the court, made the following observations at paragraph [25] in relation to Section 25(2) of the Act of 1980;

"[25] In R v Rafferty [1999] 8 BNIL 8 this court considered this provision and concluded that the power of the court to admit fresh evidence was

> fettered only by what is necessary or expedient in the interests of justice; the factors listed in Section 25(2) are merely factors which are to be taken particularly into account. It clear, however that not only must the court consider these factors but it must also address the question of what the interests of justice require in relation to possible fresh evidence. We consider that this is an obligation which arises when the court is aware of material that might qualify for admission in evidence under sub-section (2) or whose receipt might be considered to be necessary or expedient in the interests of justice under sub-section (1). In our view the court is empowered to receive such evidence even if no application is made for its receipt and further it must consider whether the interests of justice demand that it be received."

[8] Generally, expert opinion evidence may only be received in relation to a subject calling for expertise which lay jurors could not be expected to possess to a degree sufficient to understand the evidence given in a case unaided. If the tribunal of fact can form its own opinion without the assistance of an expert, the matter being within its own experience and knowledge, expert opinion evidence is inadmissible because it is unnecessary.

[9] Perhaps the primary concern, in the context of this application to admit expert evidence, is the statistical validity for the application of the propositions advanced by Professor Conway to the circumstances of these appeals. It was not altogether easy to obtain a clear picture of the nature and extent of the database from which Professor Conway had derived his main propositions. Professor Brewin appeared to have asked for relevant details but without a great deal of success. It seems that at least part of the data upon which Professor Conway relied in relation to the ability to recall earliest memories was drawn from a BBC survey of children and much of the remainder of the research seems to have been based upon laboratory experiments. At one stage Professor Conway referred to "a very large data base of first memories" amounting to some 10,000. However, in answer to a question from the court he expressly conceded that his evidence was not based upon any empirical research specifically directed to childhood memories of sexual abuse. In such circumstances the scientific basis is lacking for his assertion that the guidelines for evaluating childhood memories contained in his report apply to such memories of sexual abuse. In the absence of relevant data it is not possible to say whether they do or not. The danger of failing to comprehend this basic requirement for the validity of inferences drawn from empirical observations was neatly illustrated by the

closing submission of counsel on behalf of the appellant DJW who advanced the argument that:

> "There is no evidence to indicate that the guidelines do not apply to childhood memories of sexual abuse."

[10] In fact, leaving aside the question of statistical validity for the present, there does appear to be some basis for suspecting that such memories may have particular characteristics. The evidence of both Professor Conway and Professor Brewin tended to suggest that childhood memories of sexual abuse were likely to be vivid and detailed. Initially Professor Conway maintained that he had not seen any evidence of trauma among the complainants concerned in these appeals. However, that assertion appears to have been based on the witness defining a traumatic experience as one that gives rise to one or more symptoms of PTSD. He subsequently conceded that a vivid memory could flow from an event which had not produced any such symptoms but was none the less disturbing, profound or, to use the phrase also adopted by Professor Brewin, "self-defining". He agreed that it would be very reasonable to infer that an act of anal rape would remain vivid despite the absence of any PTSD symptoms. Such memories may have a high degree of self reference or personal significance and, according to Professor Conway, may well be vivid, persistent and the subject of repeated thought. At page 78 of his report he wrote:

> "Perhaps the most extreme form of memory vividness is to be found in the psychological illness of *posttraumatic stress disorder* where the experience of trauma gives rise to vivid 'reliving' of details of the trauma…… Although it should be noted that other non-traumatic experiences of personal significance can also be remembered with a high degree of vividness. Highly vivid memories are retained for long periods (over a full lifetime in some studies) and may be resistant to forgetting, or at least to the normal process of forgetting."

[11] Professor Conway emphasised upon a number of occasions that he was not qualified to express an opinion as to the reliability or unreliability of an individual's memory. He accepted that was a matter for the factual tribunal but maintained that his expertise did permit him to state that the detailed and fluent narrative statements provided by the complainants in these appeals appeared very unusual as accounts of childhood memories. However, in our view, the statistical limitations of the data upon which the relevant research is based effectively prevents the drawing of such an inference particularly in the context of evidence suggesting that, as a sub category, childhood memories of

abuse may well have characteristics that distinguish them from other types of autobiographical memory. In the event of Professor Conway being given permission to give evidence it would seem almost inevitable that the Crown would seek to rely upon Professor Brewin, or some other appropriately qualified expert, for the purposes of highlighting the shortcomings of his evidence. There would be conflicting expert evidence as to the nature and extent of inferences that could be validly drawn from the relevant research, the extent to which the childhood memories of sexual abuse in adults not suffering from PTSD might display distinctive characteristics, the nature and extent of such characteristics, the extent to which such characteristics might be related to the police interviewing process etc. In summary, we do not believe that such a debate would be of assistance to a jury which would then be faced with the difficult task of reaching conclusions as to what was scientifically "unusual" but not necessarily "unreliable" evidence.

[12] Apart from its scientific foundations, the court had some further reservations about Professor Conway's evidence. For example, he categorised the estimates of abuse given by one of the complainants reducing incidents from two or three times a week to once a week or once a fortnight as "exaggerated specificity" rather than a general estimate and he made a similar point in relation to the number of pictures said by one of the complainants to have been present on a bedroom wall. The complainant had used the words "…there was possible 4/5, possibly even six pictures…." Professor Conway expressed the view that such a description constituted "an unusual detail" although he would not have done so and thought that it would have been fine if the complainant had said "...there was some pictures on the wall…..I know there was more than one" It is perhaps rather difficult to form a view as to how this fine distinction might impact upon the jury particularly a jury that was to be reminded that "usual/unusual" was a matter for Professor Conway while they had to decide on reliability/unreliability.

[13] Professor Conway was critical of the use of adult language to describe childhood memories. However, he accepted that, since they were now adults, it would have been difficult to expect the complainants to use any other form of communication. When pressed by the Court to explain why such usage might indicate some doubt as to whether the complainant had actually suffered the abuse his reply was:

> "I'm not saying either that he did or he didn't experience this. All I'm saying is that as a description of memory from childhood this is unusual."

In relation to this aspect of the evidence we find ourselves in agreement with the President of the Queen's Bench Division who said in the course of

delivering the judgment of the court in the case of R v CWS and W at paragraph 24:

> "If we understood this correctly, (and we should indicate that we may not be doing full justice to this part of the evidence) we should record that we should expect an adult, describing early childhood experiences, to use adult language."

[14] Dealing with a specific allegation of anal rape said by a complainant to have occurred on a tractor Professor Conway was critical of an estimate of time and went on to say:

> "And very, very poor on violence as well. And the fluency for memory dating to this age is also unusual. Also I think it might be reasonable to assume that this event would have been fairly disturbing for a five year old. And in this respect the apparently, emotionally uneventful journey back on the tractor and then stopping off for an ice cream seemed rather nonchalant."

It is quite simply impossible to reconcile this opinion with the police statement and evidence of the individual concerned. In the former there are references to "I knew this was terrible. I was very shocked… I just froze….I screamed, I was in agony……I was fighting him trying to get away to make it stop…….I was in agony and I kept screaming and he let me go. He told me to stop crying…….I have had many nightmares over the years….." The transcript of this complainant's evidence also referred to him screaming and being in agony. The complainant recorded how he had been really hurt and very sore for two or three days. Despite being pressed about the use of these phrases Professor Conway continued to maintain that it looked as if the complainant was saying that, despite a probably physically and emotionally traumatic experience the complainant had "simply popped along to get an ice cream."

[15] It seems that a similar application to admit the evidence of Professor Conway as fresh expert evidence was made to the Court of Appeal in England and Wales in R v Jonathan CWS and Malcolm W. In that case Professor Conway appears to have conceded that his evidence was too "state of the art" at present to be able to feed into the "very practical issues that the courts are concerned with." In the course of giving the judgment of the court Rafferty J, the President of the Queen's Bench Division, described this concession as a "commendable acknowledgement of the current limitations of this `very difficult science'". Such an application was also before that Court in

R v Bowman. In that case an application had been made to have the evidence of Professor Conway admitted with regard to a witness who was five and a half years old when she purported to have been present at the murder of her mother. In the course of his report Professor Conway had said that as a memory researcher he would not rely on the accuracy of memories between the age of five and seven unless there was additional, independent, corroborating evidence although in giving oral evidence he conceded that childhood memories are likely to be accurate as a theme but may be coloured by inaccuracies. After receiving his evidence *de bene esse,* the Court, in rejecting the application, dealt with it in the following terms:

> "In our judgment it is on the very borderline of admissibility. Essentially the professor's evidence of the results of research into memories goes little further than is commonsense and well within normal human experience. He accepted that a traumatic event occurring when a person is under the age of seven can be recalled by that person in adulthood."

[16] We respectfully share the concerns of the Court of Appeal in England and Wales. We heard no evidence to indicate that this area of research had significantly advanced since 2006 and we note the express recognition contained at paragraph 2.iv of the Guidelines on Memory and the Law, a report published in June 1998 by the British Psychological Society, to which we were referred during the appeal that "It may well be some time before memory evidence will be admissible in general terms." Accordingly, we do not propose to accede to the application to admit Professor Conway's evidence. In reaching that conclusion we acknowledge the insights that have emerged from the research to date such as the concept of "trivial persuasion," the need for caution on the part of the police when taking witness statements in this type of situation and the need to recognise that greater detail should not necessarily give rise to enhanced credibility. We also accept that the research remains in progress and may develop further in the future.