

IN THE CROWN COURT SITTING AT OMAGH

THE QUEEN

-v-

BRENDAN O'CONNOR

Loughran J

[1] The defence has applied under article 76 of the Police and Criminal Evidence Order 1989 for the evidence of the complainant to be excluded on the grounds that it was obtained as a result of the complainant having been hypnotised.

The offences

[2] The defendant is charged with 17 counts of indecent assault contrary to section 62 of the Offences against the Person Act 1861 and 6 offences of buggery with a boy under 16 years of age contrary to section 61 of the Offences against the Person Act 1861. The offences are alleged to have occurred in the period between 29 October 1980 and 31 October 1987.

The context in which the complaints were made

[3] The complainant is ST who lived close to the defendant during his childhood years. He described in his statement of evidence dated 28 June 2008 the circumstances which led to the making of his complaint:

“I never told a sinner about the abuse until a year and a half ago ... what has made me talk about this now and take action is because I had a lot of difficulties over the last few years and I could never understand what was wrong, why I suffered from depression... I now realise thanks to my counsellor, that it was not my fault what happened and that I was a child at the time.”

[4] The counsellor referred to by the complainant was W from whom there were 3 witness statements. In his statement dated 16 September 2008 W said that the complainant had “been referred...by his parents as they were concerned for his welfare. He wasn’t attending his work and drinking heavily. ... Over the first few sessions...with [ST] he made some disclosures... He told me that during his childhood he had been the victim of sexual abuse. This started when he was about four or five years old”.

In his statement dated 10 July 2009 W said that he did “not keep any written records or notes of sessions...with [ST]. The reason for not keeping notes and records is because of time. I want to give my clients my full attention and will not use a session up by writing notes. I do not want my therapy sessions to be bogged down with red tape. Therefore I do not hold any file as such on [ST] but I do have a diary within which I have [ST’s] appointments written... Regressional therapy is regressing into the past and getting a client to talk about what they have experienced. I used regressive therapy on [ST]. When he first came to see me he was a very angry and confused man. He was full of self-hatred and also had a lot of guilt and shame. [ST] didn’t disclose to me that he had been sexually abused until maybe the third session I had with him. [ST] had been saying that he thought something had happened with a neighbour that didn’t make sense to him. In the following sessions things clarified more and he began to be more clarified and the pieces of the jigsaw came together. My role in [ST’s] disclosures was listening to him and guiding him and facilitating this unlocking process. At no time do I put suggestions into client’s minds as was the case with [ST]. His disclosures were independent and came out from me allowing him to talk freely in a neutral environment... I should point out that regressive therapy is about talking about negative experiences in the past, it is not the happy ones as they don’t do you any harm”.

In his statement dated 22 February 2010 W said that:

“[ST] had memories in his head about being abused but these memories did not come out until some time between the second and fourth session I had with him. He had been talking about the past and during these talks in the therapy sessions these memories came out. I had got [ST] into this relaxed state by telling him to relax into his seat, relax every part of his body and relax his breathing. I also told him he was relaxed. [ST] came out with these memories of being sexually abused as a child of his own free will during these therapy sessions. What I should say is that [ST] was telling me that he was getting feelings and memories of being inappropriately touched”

Oral evidence

[5] On 23 February 2010 the court heard oral evidence from W who was tendered by the Prosecution and from Dr Naish who was called on behalf of the defendant.

[6] W described his own background. He left school with no formal qualifications and worked as a plasterer in the building trade. From 1990 until about 1995 he was attending once a week for therapy with Y; the therapy consisted in Y using relaxation and free association techniques with him and letting his mind wander back to talk about negative experiences.

During the therapy W developed an interest in becoming a hypnotherapist and undertook a course of distance learning which led to the award of a Diploma in Hypnotherapy and Pure Hypnoanalysis from the International Association of Pure Hypnoanalysis and to the granting of membership of the International Association of Pure Hypnoanalysts. On its face, that Diploma records that W has “successfully completed a practitioner-level training course in Clinical Hypnotherapy and Pure Hypnoanalysis. Having passed a written and practical examination and having agreed to a strict code of ethics, is deemed a fit and proper person to practise Hypnotherapy”. The diploma is signed by Robert Kelly who is described as “course director” and is dated 1 February 1993. The certificate of membership of the International Association of Pure Hypnoanalysts is also dated 1 February 1993 and records that membership was granted by Robert Kelly.

W was asked about his studies for the diploma. They lasted for a period of about six months and W estimated that they were for about the equivalent of one month’s full-time study. He completed some assignments but could not remember the subject matter of any of them except for one on the history of therapy and on how a child can repress a memory and the process involved in recovering those memories. He met a tutor face to face on two occasions and could not remember the name of the tutor. The only supervision of his practical work was at a weekend seminar in Dublin attended by 25 people with 2 tutors during the course of which he hypnotised under supervision another person attending the seminar. He attends one or two seminars annually but could not remember the subject matter of any of those seminars.

[7] W commenced work as a hypnotherapist in or about March 1993. He sees his role as “doing therapy to relieve people of their symptoms, whatever is holding them back in life and set them free”. He does not take any past history from his clients prior to seeking to unlock memories and does not keep any note of questions asked. He does not make any suggestions to clients and is confident that, while there is a risk of false memory, it will become clear through therapy whether the memory is in fact false. He thought he had read the Home Office guidelines on The Use of Hypnosis in the Investigation of Crime but was not aware of any guideline that there should be a written resume of a witness’s recollection prior to hypnosis or

of any guideline that there should be a video recording and transcript of the session of hypnosis.

[8] Dr Peter Naish is a chartered psychologist who obtained a doctorate in psychology from the University of Oxford in 1981. He is an Associate Fellow of the British Psychological Society and Fellow of the Royal Society of Medicine, a member of the Experimental Psychology Society and chair of the Council of the British Society of Clinical and Academic Hypnosis. He was a member of the Working Party set up by the British Psychological Society to develop guidelines for the safe and ethical use of hypnosis. He has published a textbook on hypnosis and a large volume of research on the topic in peer reviewed journals.

He currently lectures in psychology in the Open University which he described as *the* distance learning organisation. A person reading for a psychology degree in the Open University would study part-time for a minimum of 6 years with many hours of work being undertaken each week. The student would meet tutors regularly and would attend a week long course each summer if the course comprised any practical element. On graduation with a degree in psychology from the Open University, the student would not be competent to specialise in any of the many areas of psychology which are claimed on the website of the International Association of Pure Hypnoanalysts to be understood by its members after one month of study. The website promises that its therapy - pure hypnoanalysis - is the quickest and most effective form of therapy available but the evidence of W was that he himself was in therapy with Y for five years.

[9] Dr Naish prepared a report dated 4 December 2009 in which he described the value of hypnosis which is not in itself therapeutic but which can be used as an adjunct to facilitate other forms of treatment; he believes that this is recognised in the directions "The Nature of Hypnosis" issued in 2001 by the British Psychological Society that:

"Where a professional person is offering hypnosis to augment a broader course of counselling or psychotherapy he or she should already possess recognised qualifications in that field of counselling or psychotherapy"

Dr Naish told the court that, while science does not like to make categorical denials, the evidence that any memory can be repressed is very weak. He cited the example of Post Traumatic Stress Disorder where the victim experiences disturbing flashbacks and requires considerable therapy to address that problem. To engage in hypnosis with the aim of unlocking forgotten memories presupposes that there are such memories and carries what he referred to as the "enormous danger" that false memories will be created as was recognised by the British Psychological Society in its guidelines:

“Research has shown that simply to label a situation ‘hypnotic’ will cause people who are attempting to recall their earliest memories to produce so many more... as to make it virtually certain that the recalled memories are false.... Hypnosis does not have any special property for enhancing memory in therapy ... Using hypnosis in this way carries a real risk of producing substantial pseudo memories some (of which) can be so plausible as to beguile the therapist and client alike into accepting them as accurate.”.

[10] According to Dr Naish it is in the nature of memories “recovered” in hypnosis that they have the quality of becoming more and more elaborate; the tendency is to be much more certain and to ignore gaps creating what is referred to as “hardened memory” which acquires a copper bottomed quality so that things “remembered” are more likely to be believed in, rather than less. He referred to the very large literature on the generation of false memories with or without hypnosis.

It was in the light of the risk of the generation of false memories under hypnosis that the Home Office issued in 1988 a circular entitled “The use of hypnosis by the police in the investigation of crime” which contained guidelines including the following:

"4. Under section 78 of the Police and Criminal Evidence Act 1984 the court has a discretion to exclude evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, it appears to the court that admitting the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. As evidence obtained from a witness who had been hypnotised cannot properly be tested in cross-examination, there must be a serious risk that the courts would rule it inadmissible under section 78.

5. It would be prudent, therefore, to assume that any confession obtained by hypnosis will not be admissible in evidence and any potential witness who is hypnotised will not be permitted to testify."

Dr Naish told the court that, while the guidelines broadly recommend against obtaining evidence by hypnosis, good practice demands that, where evidence is sought in this way, the first step is to establish everything relevant which the witness knows before hypnosis and to video-tape the hypnosis session(s). The purpose of these requirements is to guard against tainting and to establish what new information emerged under hypnosis.

[11] In his written report Dr Naish was critical of the modus operandi of W and in particular of his failure to keep written records of his sessions with [ST] and of his belief that he is nonetheless able to provide a clear and accurate account of those sessions, sixteen months later, despite the fact that he claims to have a large client base. Dr Naish questions how the “piecing of the jigsaw (for [ST]) came together” and why a person who was sexually abused up to the age of 13 or 14 would need to put a jigsaw together unless the memory elements were being assembled de novo. For Dr Naish the practice of W was guaranteed to induce false memories in some clients and in his view [ST] has made a link between his depression and allied problems and childhood abuse “only because the woefully under-qualified W had told him that these past events were the cause”. Without further information and in particular without examining [ST] himself, Dr Naish could not say whether he was more or less likely to be a person in whom false memories would be induced but his conclusion was that it would be unsafe to accept the allegations by [ST] as true accounts of actual events.

Crown Prosecution Service Guidance on Hypnosis

[12] The CPS has published updated guidance dated 15 February 2008 on Hypnosis including the following:

“Information obtained under hypnosis should always be treated with great caution. There is a strong likelihood that evidence obtained under hypnosis will be unreliable and inadmissible in criminal proceedings. Information obtained under hypnosis may be true or false. The technical term for false information is "confabulation". It is impossible to distinguish between the truth and confabulation unless there is independent evidence confirming the information.

A person under hypnosis may be subject to "cueing".

This means:

- explicit or implicit suggestion by the hypnotist;
- something said long before the session;
- something that the witness just happened to be thinking about;
- a fantasy of the witness.

During hypnosis these can become fixed as facts in the mind of the subject. There is no reliable means of guarding against this happening.

You should advise the police to restrict the use of hypnotism to people who may be able to give them a lead on an investigation but who will not be called as witnesses. There may be exceptional circumstances where the witness whom the police wish to hypnotise is the victim of the crime and also the sole witness. It is highly desirable to look for corroboration of any evidence obtained under hypnosis before allowing a prosecution to proceed.

A witness who has been hypnotised will often tell a story full of detail which may appear utterly convincing. No expert will be able to tell if it is the truth or confabulation. The story told under hypnosis will become so firmly fixed in the subject's mind that he or she will become unshakeable in cross examination. If you are proposing to rely on a witness who has been hypnotised, you should check if the session was recorded on audio or videotape”.

Jurisprudence on the admissibility of evidence obtained as a result of hypnosis

[13] In R v McIntosh (1995) CLY 930 the Court was considering the admissibility of the evidence of a complainant who had lost his memory as a result of head injuries sustained during an assault. He underwent hypnotherapy treatment and was then able to identify his assailant. The court referred to the Home Office circular and concluded that, while the evidence of the complainant was not inadmissible in law, it was so unreliable that the trial would be unfair if it was in fact admitted. The court recognised that the weight to be attached to evidence is normally a matter for the jury but determined that the evidence of the complainant was so replete with false confidence which might have been engendered through hypnosis that it could carry virtually no weight and should be excluded.

[14] In R v Browning (1995) Crim LR 227 the Court of Appeal considered whether the failure by the Crown to disclose that a witness had only after hypnosis recalled full details of the registration number of the car allegedly driven by the murderer rendered a conviction for murder unsafe. The decision was that non-disclosure of the hypnosis sessions and non-compliance with the following Home Office Guidelines constituted a material irregularity:

- the hypnotherapist must take a resume of the witness's recollection before hypnosis occurs
- the interview must be video recorded and the video transcribed
- the hypnotherapist must make a short witness statement

[15] In R v Trochyn 2007 4 LRC 568 the Supreme Court of Canada ordered the retrial of a defendant convicted of murder, concluding that the testimony of a

neighbour, who recalled under hypnosis that she had seen the defendant at the victim's apartment in the hours following the murder, was too unreliable to be admitted in evidence. The hypnosis had been conducted in accordance with the **Clark** guidelines on the admissibility in criminal trials in Canada of evidence obtained as a result of hypnosis.

Deschamps J reviewed the history of those guidelines which had been developed to a considerable extent as the result of the expert testimony of Dr Martin Orne in State v Hurd (1980) 414 A2d 291 NJ Sup Ct and were "intended to limit the possibility of a hypnotist influencing, inadvertently or not, the person being hypnotised, thereby tainting the witness's evidence. While they play an important role in limiting the possible exertion of influence during a hypnosis session, the guidelines are problematic in that they are based on an assumption that the underlying science of hypnosis is itself reliable in the context of judicial proceedings. Reliability is an essential component of admissibility. Whereas the degree of reliability required by courts may vary depending on the circumstances evidence that is not sufficiently reliable is likely to undermine the fundamental fairness of the criminal process". Dr Orne had, subsequent to his evidence in State v Hurd, warned in Burrall v State (1999) 724 A2d 65 that "hypnotically induced memories should never be permitted to form the basis for testimony by witnesses or victims in a court of law (because) there is a considerable risk that the inherent unreliability of information confidently provided by a hypnotised person may actually be detrimental to the truth-seeking process". Deschamps J noted that the latter evidence led New Jersey to join the 26 states in the United States that limit the admissibility of post-hypnosis testimony. Her conclusion was that "since the Clark guidelines are derived from Dr Orne's testimony in State v Hurd it would be disturbing for this court to blind itself to the subsequent developments in the American cases. With the basic reliability of post-hypnosis evidence increasingly in question judicial approaches to such evidence have tended to shift from an assessment of weight to be attributed to post-hypnosis testimony to whether it should even be admitted".

Deschamps J then considered some scientific findings on hypnosis and concluded that "there is a general consensus that most individuals are more suggestible under hypnosis, that any increase in accurate memories during hypnosis is accompanied by an increase in inaccurate memories, that hypnosis may compromise the subject's ability to distinguish memory from imagination and that subjects frequently report being more certain of the content of post-hypnosis memories regardless of their accuracy. In sum, while it is not generally accepted that hypnosis *always* produces unreliable memories neither is it clear when hypnosis results in *pseudo-memories* or how a witness, scientist or trier of fact might distinguish between fabricated and accurate memories"

The learned judge concluded that "(The technique of hypnosis) and its impact on human memory are not understood well enough for post-hypnosis testimony to be sufficiently reliable to be used in a court of law. Although hypnosis has been the subject of numerous studies these studies are either inconclusive or draw attention

to the fact that hypnosis can, in certain circumstances, result in the distortion of memory. Perhaps most troubling is the potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes. At the present time there is no way of knowing whether such information will be accurate or inaccurate. Such uncertainty is unacceptable in a court of law.”

Decision

[16] Article 76 of the Police and Criminal Evidence (NI) Order 1989 provides that:

“In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances including the circumstances in which the evidence was obtained the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

[17] The focus of my concern is the circumstances in which the evidence of the complainant, ST, was obtained. He was subject to a series of sessions of hypnoanalysis by W and during the course of those sessions he made allegations about the defendant. There is no evidence before the court that, prior to these sessions, ST made any complaint whatsoever against the defendant. The question is therefore whether the complaints made after hypnoanalysis should be admitted.

[18] It is clear from the limited domestic jurisprudence that there is no absolute ban in the United Kingdom on the admissibility in a criminal trial of evidence obtained under or after hypnosis. In determining whether the evidence of ST should be admitted in this trial the starting-point is the expertise of W. The certificate awarded to him from the International Association of Pure Hypnoanalysis is quite misleading in that from his oral evidence it is quite clear that he did not pass a practical examination; his practical work was when he himself was a patient with Y. The distance learning course which led to the award of the certificate was estimated by W to be the equivalent of one month’s full-time study. This is in dramatic contrast to the route by which, for example, a student with the Open University would become qualified to practise hypnosis. Such a student would be required to undertake a 6 year part time course leading to a degree in psychology followed by further specialised study. It was this contrast which led Dr Naish to describe the qualifications of W as “woefully inadequate”.

[19] This court concludes without any hesitation that any evidence obtained under hypnosis by W would, because of the paucity of his qualification to practise hypnosis or hypnotherapy, be inadmissible in criminal proceedings. The evidence of ST cannot be admitted against Mr O’Connor because of the circumstances in which it was obtained.

20. Because of this conclusion it is not necessary for the court to consider further the methodology of W in conducting the sessions of hypnoanalysis with ST.